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The Child's Right to an Education for Open-Mindedness: A Moral and Legal Theory of Materials Access and Selection in Educational Curricula

by

Danielle Alice Marie Dalton ©

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled *The Child's Right to an Education for Open-Mindedness: A Moral and Legal Theory of Materials Access and Selection in Educational Curricula* submitted by Danielle Alice Marie Dalton in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Philosophy of Education.

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Abstract

This research arises out of the belief that curricular materials selection does not adequately align with children's educational rights. I defend the position that the child's interest in an education for open-mindedness, in particular, is integral to her roles as an autonomous person who will govern the course of her own life and as a citizen in a liberal democracy. In order to make good choices in both capacities, the child must be capable of seeing beyond her presently held beliefs and values to other options, and must be capable of subjecting those current beliefs and values to critical scrutiny. I argue that the willingness and ability to entertain seriously views other than one's own presumes the possession of the virtue of open-mindedness.

The nurturance of the virtue of open-mindedness must correspond to developmental theory. This would suggest that the early years of relatively unsophisticated rational capacities would be marked by the inculcation of beliefs and values fundamental to the virtue of open-mindedness; in later childhood, the development of open-mindedness will require engagement of the critical faculties through confrontation with challenging and controversial ideas. The virtue of open-mindedness is so central to autonomous personhood and democratic citizenship, I contend, that it is a vital interest which merits the ascription of a moral right to children. An acknowledgement of the morally egalitarian nature of children and parents leads me to say that the child's moral right to an education for open-mindedness pre-empts even the parental right to direct the education of one's child, as the former right is more fundamental to personhood. This moral right is not only the ground of moral duties on the part of others, I suggest, but is also the impetus to hail a corresponding

legal right. I conclude that the child's right to an education for open-mindedness, while currently a legal orphan, can find a constitutional home in section 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to life, liberty and security of the person, and section 2, which protects the fundamental freedoms of conscience, religion, thought, belief, opinion and expression.

Acknowledgements

I once heard that the largest living organism is a stand of aspen located in Colorado. Although each tree appears to stand alone, it was discovered that their roots, in fact, form part of a common system which nurtures and sustains what seem to be distinct entities. I keep this metaphor in mind both in times of distress and in times of joy, and the writing of this dissertation has, in both senses, provided ample opportunity for meditation on interconnectedness.

I would like, first, to thank my supervisor, Eamonn Callan, for whose mentoring I am truly grateful. His patience and his demand for academic rigour combined to foster conditions fertile for the creation of a work of which I am pleased to have been the author. I also wish to thank my committee members, Dr. Richard Bauman, Dr. Jerry Coombs, Dr. Margaret Mackey, Dr. Frank Peters and Dr. Alvin Schrader with whom it was a pleasure to discuss my work in a spirit of collegiality.

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My children, Aubrynne and Marynek will, I hope, be proud of their mother, despite having had to share me with a thesis for the past several years. Perhaps the only regret I have is that this prolonged effort has required me to give up time with them during an important part of their lives. More than anything else, I hope the completion of this dissertation will allow me to lavish time and energy on my family, and allow me to try to recapture time that was sacrificed in pursuit of this goal. I thank them for the kind of unquestioning acceptance that only children can have.

And finally, I thank my partner, Bill, who is an oak among aspen. He has been supportive in more ways than can be enumerated here. Let it suffice to say that without him, this thesis would never have been written. It has been a joint venture throughout, and, although my name appears as the author of the finished product, this dissertation is his too. It is my good fortune to have my roots intertwined with someone as caring, giving, passionate and inspiring as he. This work is dedicated to him.

All in all, I can think of no better place in which to be an aspen than in this stand which is my community.

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CHAPTER ONE

INTRODUCTION

Every child in Canada is a participant in the educational enterprise. As partners in this enterprise, those who are entrusted with the education of children select, from the smorgasbord of available educational materials, fare which will nourish students to learn and grow. Yet, despite an intuitive recognition of the central role of materials in achieving educational objectives, there is a paucity of research which adequately addresses the question of what materials students ought to have access to and what considerations ought to govern those decisions. What we need is a picture taken with a wide-angled lens in order for theory to adequately inform policy-making decisions with respect to students and materials access. In short, there exists a need for a comprehensive theory of materials access and selection in the educational context.

The issue of censorship will immediately come to mind, and one might argue that a relatively recent blizzard of discussion on the topic has settled into an impressively expansive snowdrift of research. I would contend, however, that censorship *per se* is only one of the issues with which we must be concerned. A theory of materials access which addresses only the issue of whether it is justifiable to *withhold* certain materials (and consequently, ideas) from students ignores other significant aspects. Given that the educational enterprise is one concerned essentially with growth, information that is deliberately provided to the students is at least as important as that which is withheld. In keeping with our earlier metaphor, we ought to be as concerned about what we *are* feeding our students – ensuring that they are receiving the best possible diet of dairy products to build bones and so on – as we are about the fact that a certain vegetarian sect may wish to prohibit meat-eating for all children.

Censorship traditionally focuses on questions of what an individual ought not to read, and what she may read; the question of whether she *ought* to read a particular book is typically ignored. The neglect might be explained by what appears to be the holus-bolus imposition of a theory of censorship for adults into the educational context. That is, we bicker about what adults ought to be permitted to read, but we do not take the paternalistic step of telling adults what they must read. This model is surely inappropriate when dealing with children.

Firstly, we *do* act paternalistically toward children, and secondly, our decisions about materials access are made within an educational context which is not applicable to adults. The latter are presumed to be entitled to some measure of liberty in deciding how they will lead their own lives and what they will and will not read. These two factors may be sufficient to justify a prescriptive element to materials access for students. In formulating a theory, then, we must be constantly mindful of the peculiar context of education. A survey of a descriptive nature will assist us in understanding the breadth of the problem, and in what it consists. We will then be equipped to chart a theoretical itinerary from which we can ultimately extract normative guidance. This dissertation, then, takes as its point of departure a review of those benchmark works which cumulatively paint the background for further analysis.

In his book, *Fear of Words* (1995), Alvin Schrader undertakes the ambitious project of assessing the ambit of censorship throughout the public libraries of Canada. The work is based on the results of a survey sent to all 998 autonomous institutions in Canada, representing both single branch libraries and library systems and covering the years 1985-87. Although the study deals with public libraries, much of the data gleaned from that will be instructive and relevant to censorship in schools.

Schrader discovered that 40% of respondent libraries disclosed restricted privileges on the basis of age or required parental consent for various materials (p.40). Interestingly, public libraries reporting age restrictions or differential treatment of materials were just as likely to support the Canadian Library Association Statement on Intellectual Freedom as not (p.44). In other words, professed support for the articulated principles made no difference in terms of children's access within any given library. Further, some respondents clearly felt it to be their duty to act 'in loco parentis' while others were uncomfortable acting in this capacity and eschewed responsibility for monitoring children's material (p. 43). Two observations may be made here. First, there appears to be a disconcerting lack of uniformity in terms of children's access to material. Secondly, it would seem that subscription to the principles of intellectual freedom often come with the silent addendum, 'but not for children.'

Over the three-year period, 35% of all respondents reported having experienced challenges, for a yearly rate of 21% (p. 60). Fifty-seven per cent of challenged materials were for target audiences from pre-school age to 18 years (p. 64). Forty-five per cent of the complainants were self-described parents and 45% were other adults. Only one in five parents described their challenge as being on behalf of a child. Despite the fact that these two groups acted largely on their own behalf, the majority nevertheless requested the removal or restriction of materials for the general consumption of children or young adults (pp. 62-3). The figures demonstrate the prevalence of paternalistic thinking, not only by parents, but by other community members. The request for removal or restriction of the challenged materials clearly reveals the intention of many individuals to formulate guidelines of appropriateness for all children. The question this raises, of course, is the authority of individuals, or even groups to dictate which ideas will or will not be available for general consumption.

Schrader found that the reasons for challenges tended to fall within three clusters. Complaints of sexual explicitness, nudity, and pornography accounted for 22% of challenges. Violence, cruelty, and scary titles accounted for 19%. Unsuitability for age group (usually because of sex or violence) represented 14% of challenges (p. 68). Schrader observes that the patterns are quite different from the result of several American studies, which found that the most frequently mentioned categories were morality, sexual content, obscenity, profanity, immaturity, the occult and witchcraft. The difference is noteworthy and may be reflective of social and political differences between the two countries. The American literature in this field should thus be approached with caution, and a reluctance to sweep into one dustpan all censorship attempts.

More fundamentally, however, the categorization highlights an observation which is no less crucial for its banality: Different people wish to censor for different reasons. There exists in much of the current literature (emanating particularly from liberal thinkers) the assumption that all censorship is 'bad'. This may be so, but we must resist the temptation to paint all forms of censorship with the same brush prematurely. Different reasons for censorship are the basis of distinct arguments, and each argument must be assessed based on its own merits. This leaves open the door to the possibility that certain forms of censorship may be justifiable and others, not.

Apart from instances of direct challenges, Schrader identifies undue acquisition pressure as being of a similar nature. The desired effect is "to move the content of the collection in a partisan direction thereby compromising traditional goals of balance and representativeness" (p. 105). Twenty-two per cent of libraries had experienced this kind of pressure, and, in fact, acquisition pressure seemed to go hand in hand with requests to remove or restrict material. Most acquisition pressures were made by religious groups and political interest groups (notably around the abortion issue) that wanted literature sympathetic to their beliefs to be placed on the shelves (p. 106).

At first glance, the practice seems innocuous enough, particularly to those who accept the thesis that we profit by having free access to all kinds of ideas, whatever their source and in whatever form they might present themselves. Donations of materials and other acquisition pressures appear less benevolent when we consider that library space restrictions and budgetary constraints require that there be some form of culling process. The alternative might be a library shelving volume after volume of neo-Nazi hate literature to the exclusion of any other kind of material. Ironically, rampant freedom in a public library may be antithetical to substantive freedom to have access to various viewpoints.

Further, there might be some concern for the factual accuracy of various materials. Where a text expounds numerous alleged facts which are obviously in error, it is questionable whether any obligation arises to house the material in the public library. Surely, whatever reservations we may have with respect to these issues in public libraries must be magnified in the school setting, where we are actively engaged in shaping young minds. The implication is that some form of censorship may be justified. The exact parameters remain to be established as our argument unfolds.

Schrader's study is confined to Canadian public libraries. Therefore, we must be wary of transposing the conclusions of that survey into the context of schooling, as the differences may be more than merely demographic. We can draw certain obvious parallels and extrapolate to a degree, but we must be cognizant of the distinctive raisons d'être of public libraries and schools. Public libraries typically operate (at least according to their subscription to the Canadian Library Association's Statement on Intellectual Freedom) as bastions of intellectual freedom with thick, if not impregnable walls. They are available to citizens who *choose* to avail themselves of the resources. A citizen may read, or abstain, as he chooses. As such, it is presumed that library clientele are agents capable of making these decisions for themselves. By contrast, formal education in Canada is compulsory to the age of sixteen, and the curriculum to which a teacher subscribes is largely non-negotiable from the student's point of view. The principles which govern materials selection, then, will be distinctive.

We turn to work which has been done within school contexts. Dianne McAfee Hopkins (1991) has conducted a representative national study of challenges to materials in secondary school library media centres in the United States. That study spans a three year time period from 1986-87 to 1988-89. Hopkins found that respondents experienced a rate of challenges at 35.9% for the entire period (p. 135). This figure is similar to the rate found in Schrader's study of Canadian public libraries. Hopkins discovered a slightly lower percentage of school libraries than Schrader's public libraries lacked any kind of selection policy , 26.9% (p. 135). Schrader had found that the existence of a selection policy corresponded with higher retention rates when challenges were mounted. Hopkins discovered that the libraries most likely not to have a selection policy were those servicing the elementary grades. Almost 43% of this group did not have selection policies compared to 23% of junior and senior high schools. Of note is the vast discrepancy between the percentage of high schools and elementary schools which have selection policies. Given that retention rates correlate to the existence of a selection policy, this would appear to make elementary school libraries particularly susceptible to materials removal. Whether or not such a discrepancy is justifiable needs to be addressed within the framework of a theory of materials access.

Although Hopkins does not address these questions specifically, she does suggest several factors which may influence the outcome of challenges to library materials in school settings (1989). She includes the existence of a selection policy and the degree of compliance as one of a number of impacting variables. School environment (including administrative authority), community environment, the identity of the initiator of the challenge, and the characteristics of the individual librarian comprise other factors. I suspect, however, that although some kind of parity may be inferred from the statistical significance of each variable, Hopkins' conceptual model may be slightly misleading. It may be that the school environment, community environment, and the librarian's characteristics in fact dictate whether or not a selection policy exists and is enforced. In other words, the presence of a selection policy is merely the aggregate indicator of those factors which are of real interest to us.

The question of how the school environment, community environment and the individual librarian impact upon censorship issues is an empirical one. For our purposes, it is enough to know that they do have a significant impact on issues of this nature. Having identified them as players in the production, it is incumbent upon us to write a script for them – to determine what roles they *ought* to be assuming. This, of course will be guided by the theory we ultimately formulate. What it will obviate are the ad hoc decisions which are made as matters of expediency and as a result of fear – fear that people who make decisions with respect to materials access are not supported either systemically or by a cogently articulated and defended argument from which they might seek guidance.

Unfortunately, no corresponding national study of censorship in schools has been conducted in Canada. Just as we must exercise caution in extending data extracted from studies focusing on public libraries, we must also be loathe to cut and paste American results on a Canadian map. Only a few provincial studies have been undertaken, most notably David Jenkinson's research on schools in Manitoba (1985). Jenkinson's research is based on a survey which was sent to all 644 public and private schools in the province and investigates a two-year period between 1984-86. Several interesting results emerged. Although parents accounted for 4 out of every 10 complaints, intramural sources, such as teachers, administrators and library workers accounted for slightly more than half of all of the challenges (p. 20). Further, while nearly 88 percent of materials challenged in public libraries were retained (although some were relocated), over half of all challenges in school libraries resulted in the items being removed. Only 20% of challenged materials remained on open school shelves after the challenges had been concluded. Several challenged books remained on shelves after having been 'altered' – expletives whited out, and pages cut out. Fewer than half of the materials challenged by parents were removed; if a principal, library staff member or student complained, the material was removed 80% of the time (p. 22). In comparing removal rates between Manitoba and two American states, Jenkinson notes that the Manitoba rate of removal was twice that of Minnesota and Wisconsin. Further, in Manitoba, within-school challenges comprised over 50% of the challenges with the majority of the complaints involving teachers. In the American studies, parents were the largest source of challenges (p. 26).

The disturbing statistics which reflect the extent of intramural censorship in Canada are bolstered by the anecdotal comments of the respondents. One principal of a rural K-12 school admitted that "I have on a number of occasions destroyed books I felt did not reflect the community's nor my own personal taste or values" (p. 27). His admission was not the only one of its kind. Most researchers acknowledge that this may be, in Jenkinson's words, but "the tip of the iceberg."

Hopkins (1991) points out that those librarians who had experienced a challenge were almost twice as likely as others to feel pressure in the selection of library materials (p. 137). Schrader deals with the act of external acquisition pressure as one related to censorship – the intent to skew the collection is analogous. Although Jenkinson's study dealt explicitly with post-selection challenges, he, too, inadvertently stumbled upon admissions of censorship which did not fall within the study's ambit – that of pre-selection censorship.

That detectability of pre-selection challenges is much more difficult than post-selection challenges may account for its sparse treatment in the literature. It may also make pre-selection censorship a cause for even greater concern than overt external attempts to censor: its insidious nature makes it largely a Trojan horse. This type of censorship encompasses a librarian's failure to purchase specific materials because of the possibility that they may offend others, or may prompt a rancorous imbroglio, or simply that the material is not concordant with the values and opinions held by the librarian. Most research focuses primarily on libraries. But it would be safe to assume that at least some teachers operate according to the same 'pain avoidance' approach. This highlights an area which has been dealt with only in a cursory fashion – teacher selection of materials for curricular purposes. To what extent do teachers select 'safe' materials for their classes for fear of repercussions? To what extent do they utilize only those materials which are consonant with their own values? A review of the literature would seem to indicate that these questions have not yet been plumbed in any kind of systematic way.

Nevertheless, there are sufficient data to awaken us from our comfortable Northern slumber. Canadian schools in particular seem to be susceptible to an alarming inconsistency in decisions regarding materials access. The power to implement those decisions appears to be wielded not by virtue of any normative justification, but by whoever has managed to wrest it. Further, the covert nature of such decisions leads the casual observer to a misplaced confidence that the educational universe is unfolding as it should.

Statistics provide us with a thumbnail sketch of the problem. But while data equip us with the figures to plot axial graphs, a singular narrative account can be both engaging and poignant. It is in these accounts that the human face of censorship is revealed. Secondly, it is in narrative accounts that the ramifications of both censorship and censorship battles become apparent. James Moffet's *Storm in the Mountains* (1988) chronicles what may have been the most acrimonious censorship battle in North America. Moffet was the senior author and editor of *Interaction,* a progressive comprehensive Language Arts series launched in 1973 and comprising 325 different books. The content of the series reflected the diversity of situations, values, tastes and dialects which mirrored America's pluralist culture. It included contemporary, classical and traditional works which reflected a rich array of diverse subjects, media and methods. The editors' holistic approach to language learning had lead them to integrate speaking, listening, reading and writing not only with each other, but also with other arts and media.

The driving force behind the vast project was the desire to inspire in students a love of reading and writing, and to find meaning in these enterprises – meaning which eluded even the most diligent readers of Dick and Jane. By presenting students with a cornucopia of quality fare, it was hoped that any learner of any background, level of development, temperament or interest could find ample to please his or her palate and come to engage with and develop language. The philosophy was one of encouraging personal growth as opposed to the development of discrete skills, such as verb conjugations and spelling, which had been amputated from the body of Language – Language not only as communication, but as the very thing which structures our world.

In April, 1974, the school board for Kanawha County, West Virginia, formally adopted the series for use in district schools the following year. Subsequently, debate concerning the content of the books accelerated to the point that a full-fledged book-banning movement was underway which eventually annexed support from various right-wing extremist groups. Predictably, one of the objections was that some of the material was un-Christian. The bases of other complaints were that the subject matter was sexual, that profanity appeared in some texts, that some passages were unpatriotic, communist, non-supportive of free enterprise, or reflective of secular humanism. One book was objected to because its cover portrayed a black boy and a white girl together. Where children were asked to discuss their opinions or feelings in relation to a work, this was objected to as constituting an invasion of privacy. One work was objected to as it referred to the Holocaust as a historical fact. Word-fun type pieces were objected to as being nonsensical; other whimsical works were challenged because they were 'not required for education'. Books that dealt with serious topics were objected to for being depressing, morbid or negative.

The indictment of bias reverberated. Moffet's reply is of interest:

> [T]he charge that the offending programs neglected traditions and classics in order to bias their presentations is false, but what is important here is why the book opponents had, or gave, this impression. Obviously, the publishers were banking on both – traditional representation plus conspicuous addition of writing by minorities, women and other contemporaries who dealt with today's

> realities and did so in a style children could relate to easily. Had we offered only the conventional textbook fare, *then* we would have been biased in our books. It is perhaps only natural that including what has not before been included made the objectors truly feel that what they were used to was being left out, when in fact, it was only being supplemented...It was precisely the totality that posed the problem for them. They wanted a highly selective, not an eclectic, package. So, to them, *Interaction* looked diabolically biased (pp. 131-2).

It is noteworthy that the school board made a concession in offering to allow any concerned parent to have his or her child exempted from reading any given book. But even this gesture of conciliation was unacceptable to the objectors. Parents and other parties who did not even have children attending the schools were unwilling to have specific children exempted. They did not want *any* children to have access to *any* of the books in the series. This gives rise to a number of issues which are relevant to our inquiry. Firstly, it is clear that those individuals or groups who feel that they have legitimate interests in carving out school curricula are not restricted to those who are personally involved in the educative enterprise. The would-be censors are a heterogeneous group, many of whom claim an interest in the education of the young simply because of their membership in the community at large. It will be essential, then, to address both the locus and the parameters of authority to make curricular decisions. For example, do parents have an interest in these decisions that entitles them to a degree of authority that would not otherwise be justified?

The Kanawha county debate was marked by the intrusion, not only of interested parties who were once-removed, but also by mercenaries – outsiders who were hired by interested parties to make a case for and publicize a particular viewpoint. The Gablers, a fundamentalist Christian couple, are such lobbyists.

Utilizing the media, the Gablers mounted a formidable campaign against the *Interaction* series, oftentimes exaggerating and misconstruing the contents of the books (pp. 107-8). It is both illuminating and alarming to recognize the immense and disproportionate influence that a well-organized campaign can come to exert, particularly when that power is wielded by two people. Moffet writes:

> CBS' 'Sixty Minutes' showed on a program in 1980 how the Gablers screen and blacklist textbooks and quoted the vice-president of a major publisher attesting to the danger a company like his risks in persisting against their disapproval. Editors keep the Gablers' bills of particulars before them as they work. 'The Gablers are the two most important people in education,' asserted Edward B. Jenkinson, former chair of the National Council of Teachers of English Committee Against Censorship. 'In 1978 they shot down 18 of the 28 books up for adoption in Texas' (p. 40).

The content of education is often considered to be arrived at through some implicit contract between parents and educators. Although practically speaking, curriculum is largely determined by school boards and by the choices of individual teachers, those parameters are set with at least the tacit approval of parents. But surely the community at large has an interest in curricular content since schools are in the business not only of educating individuals, but citizens as well. The extent to which the community can assert an interest and demand compliance remains nebulous. The boundaries of the area which properly falls within the ambit of citizenship education and which is therefore properly subject to community control and that which is not, remain unclear and beg discussion.

Ironically, the textbooks were returned to the schools with nary a whisper of complaint the year following the uproar. But, in Moffet's words, the censors had lost the battle but won the war. It was felt that the situation led to self-censorship, or what some have called 'the chill factor' – the pre-selection and removal of books by educators in anticipation of complaints. In the aftermath of the battle, teachers no longer felt comfortable using their professional judgment in the selection of instructional materials. Only the most non-controversial grammar lessons were being taught in Language Arts courses (pp. 26-7). That same chill wind blows through textbook publishing houses. Moffet remarks,

> [N]o publisher has dared offer to schools any textbooks of a comparable range of subjects and ideas and points of view to those the protesters vilified and crippled on the market…A textbook series represents millions of dollars of investment, and only a few large corporations in the trade can ante up that kind of capital. They will do virtually anything to protect those outlays and make them pay off. Educational philosophy does not play even a bit part in this financial theater (p. 28).

David Moshman (1989) points out that Texas and California, in particular, have been the focus of national attention because textbooks are selected on a statewide basis in those states. "[P]ublishers, rather than lose such large markets," he notes, "often revise their books to suit Texas or California. Thus the nature of the texts available for the entire country is often substantially affected by decisions made in one or two key states" (pp. 119-120). Because there is a strong tendency for schools to avoid controversy, and because school texts are selected in that same spirit, publishers skirt anything seriously controversial in designing textbooks.[1]

The treatment of these issues in an entirely academic fashion is misleading. Not misleading in the sense of being a dry diversionary exercise, but rather, in the sense that the issues become denuded of those factors which cast an aura of urgency about their resolution. Philosophical discussion belies the tremendous violence and upheaval which characterized the Kanawha County war. Board members and the

Superintendent were assaulted. Rocks were thrown at school buses and at the homes of parents who sent their children to school in defiance of the boycott. Churchmen who fought for the removal of the books became involved in conspiracies to bomb carloads of children who continued to defy the boycott. Some schools were targets of gunfire, fire bombs and vandalism. Part of the School Board building was dynamited (pp. 23-4). The Reverend Charles Quigley, a fundamentalist minister stated,

> I am asking Christian people to pray that God will kill the giants [the three board members who voted for the books] who have mocked and made fun of dumb fundamentalists (p. 19).

Although never reaching the sensational heights of their American counterparts, censorship battles nonetheless exist in Canada. In *Censorship Goes to School*, David Booth (1992) recounts the tale of *Impressions*, the most-censored series in North America. Like its predecessor, *Interaction,* the series abandons Dick and Jane phonics readers for reading for meaning and relevance. On the tenor of censorship in Canada Booth comments:

> Canadian educators have seldom before taken advocates of censorship seriously, and they have given even less consideration to the reasons for attacks on books. When a parent or group of parents made a complaint, often a school board banned the book in question without a trial, without bothering with details such as charges and examination of the facts. The removal of a book effectively endorsed the view that it was guilty of some offense (p. 11).

It is perhaps for this reason that censorship battles in Canada tend to be somewhat more subdued than those south of the border. Nevertheless, Canada is not immune to such pressures. Booth describes an incident in 1992 which occurred in Manning, a small town in northern Alberta, where parents of twenty-eight families stormed their children's school, held the principal captive in his office, and then cleared the classrooms of allegedly satanic materials (p. 72).

The violence and tumult of censorship battles reveal how passionate is the concern many people have over the issue of what children read. This passion exists in stark contrast to the textbook publishers' calculated selection of materials based largely on profitability. There is an obvious incongruity between the importance of the task of educating the young and the pecuniary concerns of businesses in determining educational content. Basing curricular decisions on the teacher's desire to avoid conflict, or the principal's personal values, or even the parent's rendering of his of her child's best interests is similarly unappealing. Moffet's remark that "educational philosophy does not play even a bit part in this financial theater" reflects an absurd situation, as it is through philosophical enquiry alone that we can strike a morally defensible balance between the many interests relevant to materials selection. It is our most powerful tool in clarifying those elements which are of the greatest import in the educational sphere, and by availing myself of this instrument, I hope to contribute to the discourse which informs curricular design and selection in schools.

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[1] See Gottlieb, S.E. (1987). In the name of patriotism: the constitutionality of "bending" history in public secondary schools. *New York University Law Review*, 62, 497-578; People for the American Way, (1987) *We the people: A review of U.S. government and civics textbooks.* Washington, DC: People for the American Way; Sewall, G.T. (1988). American history textbooks: Where do we go from here? *Phi Delta Kappan*, 69, 552-558.

CHAPTER TWO

AUTONOMY

Introduction

An overview of materials access issues has focused our attention on the need for consistent and defensible guidelines in addressing these concerns. Education is, without question, a purposeful activity; it is then obvious that the reasons for which we select materials and the way in which those are utilized ought to be consonant with the objectives of education. But that enterprise is fraught with difficulty in that our society does not have a monistic conception of the ends of education. Not only is there a lack of consensus with respect to which objectives ought to be emphasized in schooling, but, in some cases, those objectives are mutually exclusive. Conciliation to a degree may be laudable, but only insofar as it is a morally legitimate compromise. Not all competing conceptions of the goals of education can or should be accommodated. The critical assessment of the objectives of education cannot be conducted in a vacuum. Indeed, what we expect of education is intimately connected to the conceptions of personhood and society that we hold, of both individuals and the communities they form.

My purpose in this chapter is not to attempt to construct an exhaustive roster of the ends of education – such an ambitious project is beyond the scope of this dissertation. Rather, my more modest intent is to explore the more elementary principles from which the goals of education derive their justification, and upon which decisions of materials access are based. These, I contend, are two-fold. The first is an understanding of persons as autonomous beings. This demands an education which nurtures in children the development of personal autonomy. I shall argue that although personal autonomy is not essential to personhood, it is valuable to a fully flourishing human life and is therefore an ideal which may legitimately be fostered in schools. The second is a conception of persons as members of a community; membership requires that each citizen be educated into the moral autonomy which enables him to treat his fellow citizens justly in interactions with them. Whereas personal autonomy can be viewed as an ideal or excellence of character attained perhaps by only a few, the moral autonomy of the citizens of a society is imperative to the existence of a liberal democracy.

Because personal and moral autonomy differ in terms of their content and justification, arguments respecting their impact upon education should be independent. That is not to say that there will not be significant overlap in terms of the conclusions to which each strand will lead; these conclusions, however, will be all the more powerful for having been arrived at through two separate routes. I shall set aside for the moment, then, the need for the education in moral autonomy for all citizens and turn to the desirability of education for personal autonomy as a valuable part of a fully flourishing human life.

Autarchy and Autonomy

The etymology of 'liberalism' is suggestive of a strong nexus between the political construct and liberty. Indeed, liberal societies hold human freedom to be of particular import in the design and assessment of political institutions. But 'freedom' is a vague and ambiguous notion susceptible to numerous nuances of interpretation. Our concern is a narrow one: What is the pith of that term which informs liberal institutions, and, more particularly, the education system that befits a liberal society?

The governing principle of liberal societies, I maintain, is an understanding of human beings in the capacity of agents. *Human beings are moral agents worthy of respect and ought to be treated as ends in themselves and not as a means to the ends of others.* The concept of agency flows from an understanding of individuals as beings who wear the mantle of personal responsibility: *We hold people responsible for their choices and actions and the consequences which flow therefrom.* The very possibility of moral action presupposes that human beings have choices, for if a person truly has no option in his conduct, it is absurd to say that he has acted rightly or wrongly, morally or immorally. The idea of personal responsibility inheres in any system of law which purports to regulate human conduct. In fact, everyone *acts* as if we have choices and, in fact, we *do* hold people responsible for their choices.

Human beings have been aptly described as 'project pursuers' (Lomasky, 1986, p. 18). They are capable of conceiving projects and values which they seek to realize and bring to fruition. David Johnston (1994) states:

> Liberal theories are based on the view that individuals are free as well as equal beings. Minimally, the claim that we are free means that we possess the capacity to be agents. From a distinctively liberal point of view, individuals count equally with one another because we all possess the capacity for human agency, not - at least not only - because we possess roughly equal capacities for pleasure and pain. By an 'agent' I mean a being who is capable of conceiving values and projects whose fulfillment may not be within the range of that being's immediate experience (p. 22).

This view leads to certain conclusions about how human beings ought to be treated. John Stuart Mill drew our attention to the importance of living one's own life from the inside, not because that is a guarantee of living the best possible life objectively, but because living one's own life is intrinsically valuable (Mill, 1962(a), pp135-138). As Stanley Benn observes:

> The well-informed and benevolent administrator of another person's life may be able to realize states of affairs external to the agent that the latter has it as his object to bring about. But such paternalist management would be a kind of theft, stealing from their author the plans for a world in the making of which he sought the expression and realization of his own nature and identity, leaving him without a part in what he meant to be his own creation. For what the benevolent paternalist is not able to bring about, or only in a very indirect sense, is that the project be realized while yet remaining the author's own (1988, p. 111).

In any sense in which a person is considered to be living her own life, the process of decision-making or exercising choice is implicated. In other words, it makes no sense to speak of an agent leading her own life unless that life is, to some extent, of her own fashioning. The *autarchic* individual is one who is capable of self-governance to the extent that she engages in reflection upon and chooses among alternative courses to some degree. Benn describes the autarchic person as one who satisfies "certain minimal conditions of both cognitive and practical rationality" (p.

154). The vast majority of human beings satisfy this condition of human normality because it is commonly regarded as the threshold criterion of a human person.

Whereas autarchy is an almost universal state of human beings, autonomy is "an excellence of character for which an autarchic person may strive, but which persons achieve in varying degrees, some hardly at all" (Benn 1988, p. 155). The autarchic person chooses her actions, but the autonomous person goes beyond that and shapes her own values and character which are the fountainhead of those actions. A person who is autonomous in this sense can be described as an "agent of self-authorship, a self-defining subject, a self-fashioning individual, or a subject of free and conscious self-creation" (Johnston 1994, p. 75).

The autonomous person subjects her values and projects to critical appraisal out of which she constructs a relatively consistent and coherent whole. Both autarchic and autonomous persons are capable of ordering preferences according to a coherent set of beliefs and to devise projects based on those preferences. The autarchic person, however, lacks those principles which could legitimately structure such a ranking. Autonomy is distinguishable by what Benn calls the idea of a *nomos* in the characterization of the decision maker (p. 176). The autonomous individual's ability to order principles into a nomothetic structure derives from her commitment to a critical, creative and conscious search for coherence within her system of beliefs and values. The part that reasons and an openness to reasons play in this process is of crucial importance, for these are what instigate the re-assessment and revision of values, beliefs and projects.

A failure to achieve autonomy does not compromise one's status as a person. The autarchic person continues to make choices in her life and to follow the path to which those choices commit her. But the beliefs and values which underlie her projects, although they are her own, are petrified and impervious to the influence of countervailing reasons. Not only might those beliefs remain tenaciously despite reasons which should support a different belief, but the value system as a whole may suffer instances of contradiction. One belief may contradict another, but these are not rectified by the autarchic person because she is committed to act according to her beliefs, not to the reasons which underlie her beliefs, because these are not subject to serious scrutiny.

There is remarkable consensus among liberal philosophers that autonomy is indeed an ideal of character. There is disagreement as to whether it is proper that the state actively promote forms of life which are autonomous, but there is little controversy concerning whether autonomy is itself a worthwhile ideal. This is so because the autonomous person not only makes choices (as does the autarchic person), he goes one step further and attempts to make *good* choices. Making good choices in a practical sense is a complex interplay between various personal abilities and, admittedly, the fortuitous turn of events. If we admit of the distinction between good and bad choices, to what do we commit ourselves? In one sense, we might understand that to mean a judgment of the ultimate consequences of one's choice. For example, we might say that Bill made a good choice to have the family barbecue yesterday rather than today, because yesterday was a perfect blue-skied summer day, while the weather today is inclement. Nevertheless, we would be loath in this context to say that Bill is a *good chooser* rather than a lucky person (unless, of course, he researched the weather before making his prognostications). The example highlights the notion that the quality of one's *choices*, in the real sense of the word, is not determined by the eventual outcome, but by the process which prompted the decision. We are not endowed with prescience. That part of the equation over which we have some control, and which we may undertake to cultivate, is our own ability to make sound choices. There simply are no criteria to judge good belief shaping and decision-making from bad save by reference to pertinent reasons and by the autonomous person's *consideration* of these reasons in coming to a decision.

Let us summarize the argument to this point. By their nature, persons are agents. They are beings who make choices and whom we hold responsible for those choices. In exercising these choices, persons pursue projects and devise lifeplans which are unique to them. Although persons must be granted latitude to shape their lives as they will, there is room to recognize a distinction between good and bad choices. The autarchic person, who merely exercises choice according to precepts which he has come by haphazardly, is vulnerable to making unreasonable and incoherent choices. Such an anomic person may lack the kind of internal regulation which might permit him to establish order among desires.

By contrast, the autonomous person scrutinizes not only the action decisions which she makes, but the beliefs and values which underlie these choices. Where contradictions and incoherence exist in the quilt of her belief system, she is capable of discarding the misfit square in favour of one which fits more consistently into the pattern of her patchwork design. In the light of reasons, she stitches in a more suitable fabric in order to maintain a cohesive and coherent whole. The ability to do this depends upon both a certain cognitive sophistication and a certain disposition of character. By a cognitive sophistication, I do not have in mind a haven of autonomy populated by fastidious intellectuals alone, but something more accessible to ordinary people in their day-to-day lives. If one might pardon the tautology, the cognitive sophistication which is required of the autonomous individual is that which is necessary to give effect to the commitment to make good choices in one's life. This would include those critical thinking skills which would permit one to recognize incoherence and contradictions in one's belief system; the ability to recognize the role of reasons in assessing options and the ability to weigh the force of different reasons. And as an adjunct to the assessment of reasons, it will demand the ability to order principles.

These skills are not generated in a vacuum. They are complemented by certain dispositions which give them impetus and sustain them. Foremost is a commitment to truth which leads one to the conscious search for coherence in one's values and beliefs. But this must be paired with an open-minded disposition, lest one close one's eyes to the possibility that truth might reside outside of one's own beliefs and experience. This is necessary to be primed to the merit of alternatives. The autonomous person must be flexible, for intransigence will prevent him from shaping his beliefs and values into a coherent whole. And finally, the autonomous person must have the inclination to consider reasons in a dispassionate way, lest he be swayed by criteria irrelevant to his judgment.

The rigours of autonomy do not place it beyond the reach of ordinary people. I am convinced that almost everyone has the capacity to achieve the liberal ideal – it is largely a question of education and desire. What will engage us in a more heated debate is whether or not autonomy is a legitimate ideal and whether the state, through the vehicle of education, should create conditions conducive to its nurturance in children.

Autonomy and Civic Virtue

To this point, I have argued that autonomy is the excellence of character epitomized by those persons who not only meet the minimal liberal autarchic standard of agency, but who strive to make good decisions in their lives by questioning their own fundamental values and beliefs. This Millian argument has come under fervent attack, the most cogent of which I will address later. But the argument for autonomy is bifurcated, and this next part of the justification may be even more compelling than the first strand. In this section, I shall argue that we are impelled toward education for autonomy by the requirements of an education for the citizenry of a state.

The necessity of civic education flows from a conception of personhood which acknowledges the inevitability of interaction and relationship between persons in the formulation and actualization of personal projects. Few lives can be considered good lives in the absence of such fraternal ties. It is primarily in the relationships which we forge that we derive meaning in life – the attachments of family and friendships, as well as society at large. To this extent, the capacity to participate meaningfully in the activities of social interaction will include the development of skills and dispositions which enable persons to participate in collective decision-making. The notion of being master of one's life is not captured entirely by the image of individuals isolated in their own private ampoules, floating here and there at the instance of the driver. Because social interaction is integral to most human lives, there is a sense that we are all engulfed by a common bubble, which we must choose to move and direct as a polity. Civic education, then, is adjunctive to respect for persons in the capacity of agents in this sense.

There is a second, and no less important, reason for civic education. Since leading their own lives and participation in political matters is equally important to other members of a society, civic education seeks to secure an environment conducive to the flourishing of all citizens by instilling in each that which is necessary to reflect a respect for the agency of others. My ability to lead an autarchic or autonomous life is only as expansive as my fellow citizens will permit it to be. If, in the eyes of my fellow citizens, it is proper to malign me for, say, my homosexual orientation, then the options open to me in terms of how I choose to pursue my own life will be commensurately circumscribed. Citizenship education allows us to pursue our own projects and to allow others to pursue their own projects in a milieu of peace and respect and as expansively as is possible within the limits of a liberal democracy.

This justification of citizenship education is loose enough that few will feel any pressure to capitulate their harboured views. But such a justification is too capacious to be of any real use in formulating a theory of materials access. What will be of import is how we choose to explain the details of civic education. What would a civic education prompted by these two reasons entail? I shall defend the proposition that a justifiable civic education will necessarily be an education for autonomy. Some consider an education for autonomy to be objectionable because it is based upon the questionable assumption that a good life requires that we critically scrutinize our own fundamental beliefs and values. But although we might subscribe to that latter view, it may be unnecessary to defend it if it can be shown that an education for autonomy is required because it is the only education which can ensure that we be able participants in the democratic process and that we adequately respect the personhood of our fellows. Whereas the Millian argument for autonomy may be persuasive only insofar as one is able to share a particular conception of personhood, the argument for autonomy which derives from a civic education may draw many more adherents. This is so because civic education is not only self-regarding – it is also an obligation which citizens hold in respect of their fellow citizens.

Johnston (1994) assists us by attempting to elucidate the distinction between, as he perceives, the two types of autonomy.

> [A]utonomy is achieved when a person autonomously chooses his own projects and values. A person who has attained the ability to do this may variously be described as an agent of self-authorship, a self-defining subject, a self-fashioning individual, or a subject of free and self-conscious self-creation…A person who is autonomous in this…sense…actively chooses the projects and values he wishes to pursue (p. 75).

This he distinguishes from the kind of autonomy necessitated by civic education.

> [Another] way of thinking of autonomy is to suppose that a person is autonomous when she has an effective sense of justice. I shall call this type of autonomy *moral autonomy.* To have a sense of justice is to recognize that other human beings are agents like yourself, with projects and values of their own, projects and values that may impose limits on the things you can do in pursuit of your own projects and values. A person who has a sense of justice realizes that she may have to restrain her own actions and claims on other

> people and resources in recognition of the fact that other people have claims of their own (pp. 72-3).

Theorists differ with respect to how robust a 'sense of justice' must be in order to adequately meet the demands of civic education. William Galston (1989) defends a minimalist view constrained by the criterion that parents in particular are not free to impede the child's acquisition of a basic civic education. This comprises the beliefs and habits that support the polity and enable individuals to function competently in public affairs. Moreover, parents may not act in ways which would lead their child to impose significant and avoidable burdens on the community (p. 98). Beyond that, however, the state must defer to parental wishes. In particular, he rejects Amy Gutmann's argument that children must be taught both "mutual respect among persons" and "rational deliberation among ways of life."[1] "The need for public evaluation of leaders and policies," he argues, "means that the state has an interest in developing citizens with at least the minimal conditions of reasonable public judgment. But neither of these civic requirements entails a need for public authority to take an interest in how children think about different ways of life" (p. 99). Social diversity requires a willingness to coexist peacefully with ways of life different from their own, but this is achieved by the lower standard of tolerance. Civic tolerance, the argument goes, permits room for unswerving belief in the correctness of one's own way of life (p. 99). This is important because in order to protect and promote the diversity that is central to liberal societies, communities must be sustained in their particular vision of the good. "Properly understood, liberalism is about the protection of diversity, not," he concludes, "the valorization of choice" (1995, p. 523).

Galston's argument raises three issues. First, is tolerance an adequate dike to ward off incursions which fail to show respect for the autarchical character of one's co-citizens? Second, does the public judgment required of citizens implicate the capacity and, one might argue, the inclination to subject one's way of life to critical scrutiny? Finally, what is the import of diversity in an argument for civic education? I shall deal with the latter of these issues first, as it calls into question the entire justification for such parsimony in the requirements of civic education. The thrust of Galston's argument is that the traditional view that autonomy and diversity cohere is specious. The view that autonomy yields diversity, while diversity protects autonomy is eroded by the fact that the promotion of autonomy by the state can weaken or undermine groups so that eventually, ways of life will disappear. But the justification of diversity as the primary objective of the liberal state is lacking in Galston's account. Indeed, why *does* the liberal state have an interest in protecting diversity? I think that Galston has it backwards. The point of liberal politics is not to protect diversity *per se*. Diversity flows from the recognition that persons are at least autarchic, and as such are deserving of some liberty in formulating and pursuing a conception of the good life. It is *these* interests which liberal politics serve, not diversity *simpliciter*. If this is so, our policies will assume a much different character. We become much more alive to the havoc that unchecked diversity can wreak upon even the minimal standard of autarchy. Diversity is legitimate only insofar as it promotes the agency of persons, all things being equal. Where an alternative candidate better secures this end, then diversity must cede its place. If this is so, then the argument that we must permit or even encourage children to hold steadfastly to their parents' unexamined beliefs and values must be examined in light of whether social diversity or *accessibility* to the autonomous life better serves the interests of persons as autarchic agents. Diversity is constrained by reasonable pluralism, and this, in turn, is shaped to a large extent by the pressures of respect for personhood.

I turn now to the issue of whether tolerance is sufficiently robust to be conducive to the flourishing of autarchic and even autonomous lives. Galston's (1989) view appears to be that the condition is satisfied if citizens exhibit a willingness to coexist peacefully with ways of life different from one's own. Of course, an absence of war and violence is a *sine qua non* for a good life. But surely respect for even the minimal autarchical character of persons is more demanding than this. Tolerance is suggestive of mere forbearance, which is a necessary commodity in the liberal state, but it fails to capture any proaction which might be crucial in fostering a climate truly receptive to the making of individual choices by moral agents.

The tolerance Galston advocates is compatible with antipathy to forms of life different from one's own. That one might be disposed to tolerate the migration of women into the workforce might prevent one from picketing outside of the Human Rights Office in an attempt to hold back the tide of previously disenfranchised women. This is very different however, from applauding the trend as the long-awaited recognition of equality in the bastion of the workplace. It is farther still from positively affirming women's equality by living one's own life according to this principle. The employer who accepts the principle of equality as his civic obligation might be inclined to hire female candidates. Although tolerance repudiates the *active* restriction of individuals' choices, it is nonetheless indictable for very real, if less obvious incursions on those same choices. A state which takes seriously the sovereignty of persons to pursue valuable, and perhaps not so valuable, ways of life must concern itself with the options that are open to them in a real sense. No state can adequately address that task merely by practising tolerance.

How, then, are we to understand the sense of justice necessary to the reasonable pluralism of liberal societies? Eamonn Callan (1997) builds upon Rawls in identifying two aspects of the idea of reasonable pluralism. The first is a commitment to moral reciprocity. Reasonable persons are predisposed sincerely to propose, discuss and comply with principles intended to fix the rules of fair cooperation with others. The other aspect is also borrowed from John Rawls – the "willingness to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime" (Rawls, 1993, p. 54).

Callan elaborates on the idea of reciprocity in this way:

> Reciprocity is a virtue designed to help us find and implement mutually acceptable terms of cooperation in circumstances where we initially disagree about what fairness requires. In exhibiting reciprocity, I begin by putting before you what I take to be fair. But I must also be ready seriously to discuss the opposing proposals that you make in the hope of moving, through the discipline of dialogue, towards a common perspective which each of us could adhere to in good conscience (1997, p. 26)

This end can only be accomplished, Callan argues, through empathetic identification with

the other's viewpoint.

> [I]f I am to weigh your claims as a matter of fairness rather than a rhetorically camouflaged expression of sheer selfishness, I must provisionally suspend the thought that you are simply wrong and enter imaginatively into the moral perspective you occupy. But since you and I are reasoning about fairness, I

> cannot be uncritical about your view (or my own) and simply split the difference between us as if we were just haggling about how best to satisfy divergent preferences. Empathetic identification must be combined with a willingness to bring the shared resources of reason to bear on the conflict at hand by assessing for example, the comparative strength of the assumptions behind our prereflective judgments or by exploring together the plausibility of the implications that flow from the rival moral principles we invoke in defence of opposing views (Callan, 1997, p. 26).

This activity is complicated by what Rawls calls the 'burdens of judgment,' which he introduces to explain the possibility of irreconcilable ethical disagreement among reasonable people and to defend the mutual accommodation required of public reason when differences threaten to become destructive social conflict.

> The 'burdens' are those particular sources of divergent judgement that persist among us when all factors that signify a remediable failure to reason competently and to exhibit reciprocity are inoperative, such as logical bungling or inordinate self-interest. They are the contingent but inescapable imperfections of our capacity to reason together towards agreement (Rawls, 1993, p. 55).
>
> To suppose that a shared reasonableness guarantees consensus overlooks the general liabilities to error and disagreement that afflict even the most accomplished exercise of reason as well as the special difficulties we face when reason is harnessed to reciprocity in public deliberation. In that setting, we face difficulties not only in weighing our own interests against those of others, but also in balancing the interests of different others, and these combine with the general frailties of reason to suggest that many residual sources of discordant judgement would survive the disappearance of the vices of unreason…[J]udgement is likely to be affected by contingencies of experience and perspective that we cannot altogether surmount however reasonable we might be; the values we live by are chosen from a wide range of possibilities, those we choose have to be arranged in some order of priority, and both tasks may be discharged in many reasonable but incompatible ways (Callan, 1997, p. 25).

The importance of the burdens of judgment to reciprocity is that if reciprocity is to function adequately, citizens must be capable of reliably distinguishing between those sources of conflict in their moral practices that are due to the burdens of judgment and those that are not. The very point of reciprocity – reasonable agreement on fair terms of cooperation – depends upon the ability to discern the burdens of judgment from sometimes irrational divergent interests. In a liberal society where divergent views are endemic, the need for the ability to distinguish the burdens of judgment in our political deliberations is great. In such a society, the reach of the burdens of judgment to meet the demands of reciprocity will be enlarged beyond the limits of reasonable orthodoxy to include reasonable heresy as well (Callan, 1997, p. 27).

> The limits of reasonable pluralism are coterminus with the diversity of beliefs and practices that are a consequence of the burdens of judgement…A political education that meets the challenge will teach the young the virtues and abilities they need in order to participate competently in reciprocity-governed political dialogue and to abide by the deliverances of such dialogue in their conduct as citizens (Callan, 1997, p. 28).

Compliance with the demands of reciprocity will be rigorous indeed and will exact acceptance of the burdens of judgment if liberal society is to achieve the goal of publicity in whatever principles of justice regulate its basic structure, and, as Callan contends, publicity is essential to the kind of stability to which a just society might aspire (1997, p. 33). Thus he is led to conclude:

> Presented as an abstract catalogue of errors and disagreement, the burdens of judgement are platitudinous, and their implications for the background culture of liberal politics appear slight. But nominal assent to a list of abstractions is not enough; the relevant acceptance must rather be an active and taxing psychological disposition, pervasively colouring the beliefs we form and the choices we make. A merely nominal assent, however widely shared, would not create the kind of mutual forbearance and respect in social cooperation that Rawls sees as the necessary manifestations of a shared reasonableness (1997, p. 34).

The parallel between the skills and dispositions necessary to discern the 'burdens of judgment' thus conceived and the skills and dispositions of the personally autonomous person is patent. If you and I are to reconcile our two divergent positions and come to agree upon a reasonable resolution, then I must be willing and able to deliver my own position into the same crucible as I do yours. Those fundamental beliefs and values which touch the public sphere I must submit to critical scrutiny. It is difficult to see how I might be capable of and willing to do this in the public sphere without transferring those same skills and dispositions to the private sphere. As Callan observes,

> …it would be absurd to teach citizens to adopt the required interpretation of their general ethical and religious convictions when they address fundamental political questions while insisting that they are at liberty to reject it whenever they are thinking or acting in a non-civic capacity. That would be to invite them to oscillate between contradictory beliefs about the rational status of their deepest beliefs and that is hardly an alluring fate for anyone (1997, p. 31).

Autonomy, or the ability and willingness to rationally deliberate about our fundamental beliefs and values which is anathema to Galston, rides on the coattails of the exigencies of a robust civic education.

One might counter that although autonomy flows from accepting the burdens of judgment as appropriate to civic education, we need not admit of a civic education quite as robust as one which precipitates a deep appreciation of the burdens of judgment. It brings us full circle to reiterate that the burdens of judgment are precipitated by two interconnected factors. Both arise from a discussion of pluralism. Firstly, once we admit that unfettered diversity is an untenable state of affairs, it makes sense that pluralism must be circumscribed by reasonableness. Reasonable pluralism, in turn, relies upon the citizenry to fix its scope. This brings us to the second factor: what is reasonable will surely be underwritten by a conception of human beings as moral agents who are worthy of respect. Such a view of persons will demand that we consider their interests in conjunction with our own in determining what is fair and just in terms of public policy.

If we are truly committed to justice in human affairs, we must be simultaneously committed to cultivating the personal attributes which support distinguishing the burdens of judgment to guide our interactions, as only a standard this robust can sustain substantive justice in politics. That autonomy will walk on the arm of a robust civic education is incidental. Both to those who champion autonomy, and to those who are more hesitant, it should relieve the strain of debate somewhat to view the nurturance of autonomy as necessarily ancillary to civic education.

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[1] See Gutmann (1987), esp. chapter 1.

CHAPTER THREE

OBJECTIONS TO AUTONOMY

The Communitarian Challenge to Autonomy

Although liberals are quick to adopt autonomy as an ideal which is not only the epitome of personhood, but essential to the smooth functioning of a liberal state, this view is not shared universally. Perhaps one of the most important challenges to liberalism has been the resurgence of communitarian ideals. Arguments for such ideals need to be addressed not only because of their popularity in political theory, but because a theory of materials access shaped by communitarian ideals would be markedly different from one informed by liberal principles. In liberal thought, it is assumed that allowing people to choose for themselves is valuable. Self-determination is valued as a prerequisite to autonomy. Both the nature and value of self-determination promoted by liberal politics are called into question by communitarians.

The hallmark of communitarian theory is that the common good is not achieved through some neutral conception of liberty which allows each individual to construct his or her own good. Rather, the common good is perceived as some substantive ideal which is determined by a community's way of life.[1] As Will Kymlicka notes, "This common good, rather than adjusting itself to the pattern of people's preferences, provides a standard by which those preferences are evaluated" (1990, p. 206).

Michael Sandel questions how it is possible "to affirm certain liberties and rights as fundamental without embracing a particular vision of the good life" (1984, p.

4). He ponders the proposed liberal solution of drawing a distinction between the 'right' and the 'good' – between a framework of rights and liberties, and the particular conceptions of the good individuals choose to pursue within that framework.

> For Kantian liberals, then, the right is prior to the good, and in two senses. First, individual rights cannot be sacrificed for the sake of the general good, and second, the principles of justice that specify these rights cannot be premised on any particular vision of the good life. What justifies the rights is not that they maximize the general welfare or otherwise promote the good, but rather that they comprise a fair framework within which individuals and groups can choose their own values and ends, consistent with similar liberty for others (Sandel, 1984, p.4).

Communitarians lament the ascendancy of liberal thought, and rights-based theory and practice it has sustained. They eschew the priority of the right over the good, arguing that liberalism paints a picture of a self-determined individual, an island unto himself, which is inaccurate. Rather, communitarians contend that political arrangements cannot be justified without reference to common purposes and ends, and that, without acknowledging our roles as citizens in a common life, we cannot conceive our personhood. The liberal conception of the individual is of a 'choosing' self – one that is prior to its ends; the communitarian conception of the individual is of an 'embedded' self – one in which identity is derived from and defined by the families and communities which we inhabit. Rather than being prior to and choosing its ends, the self is largely constituted by those very ends.

At first blush, the competing visions appear to be very far apart indeed. A focus on the inculcation of specific values and beliefs will be the thrust of a communitarian education. Because there is a perception of having the knowledge of the good in the palm of the communal hand, it is seen as being incumbent upon the society to initiate children into the traditional vision of the good. To subject the conception of the good to the vicissitudes of individual whim or reflection is to do a disservice both to society and individuals. As such, a theory of materials access and selection would be one which would ensure limited exposure to 'non-mainstream' thought. Furthermore, partiality in the presentation of material would not only be permissible, but required. If it is assumed that the society has struck upon the truth, then partiality in materials selection will be a virtue to the extent that it promotes that truth and prevents children from attempting to mine competing visions.

The liberal view, on the other hand is premised upon a humility in truth-seeking. It presupposes that no one has a corner on the market, and that reasonable persons differ in their conception of the good life. In deference to the autonomy of individuals, a liberal education would require access to materials which depict the array of possibilities from which to choose. Further, it has often been regarded as requiring strict state neutrality toward competing visions of the good life. Such a model would suggest broad access to materials and a suspension of judgment or bias in both the materials themselves and on the part of the teacher.

But this schism may be exaggerated. Stephen Macedo states:

> As an alternative to instrumentalism, several communitarians exhibit a nostalgia for a social world governed by a politically authoritative conception of the good life, but are more than a little elusive about what they believe the human good consists in. There is no reason why a belief in common or objective human goods should lead one away from liberalism. It may be, after all, that the good life is importantly linked to human freedom (1990, p. 207).

I contend that a strict communitarian ideal is not defensible and that communitarianism in any weaker sense merely collapses into liberal theory.

The first argument communitarians level against liberalism is that it makes happiness if not unattainable, at least an elusive commodity. Happiness is only within reach when individuals do not suffer alienation from society, and alienation is rampant wherever each individual is encouraged to pick and choose his or her own ultimate ends. Charles Taylor describes the Hegelian view that

> The happiest, unalientated life for man, which the Greeks enjoyed, is where the norms and ends expressed in the public life of a society are the most important ones by which its members define their identity as human beings. For then the institutional matrix in which they cannot help living is not felt to be foreign. Rather it is the essence, the 'substance' of the self (1984b, p. 185).

The liberal cacophony created by each singing his or her own tune is said to detract not only from social, but personal harmony as well.

The first point to be made is that the communitarian nostalgia for the harmony of bygone days is a historical figment. The practice of people abandoning the public interest for private ends was as familiar then as it is now. The difference, one might conjecture, is that we now have a forum which is more accessible to oppressed voices, a forum of which this group could not avail itself in a less liberal society.[2] Further, for our purposes, communitarians may be amplifying the discord inherent in a liberal society. While liberal institutions tend to accommodate a very broad range of visions of the good life, the tendency to do so might be significantly circumscribed in the context of education. Liberals avoid acting paternalistically toward adults in recognition of their status as agents. Adults are even permitted to exercise bad judgment and make bad choices. Children, however, are not yet agents who are responsible for their own actions. Whatever the merits of anti-paternalism and neutrality regarding the good in the state's dealings with adults, these doctrines cannot be a sufficient basis for the education of children with limited capacities to reason and an identity that is in the process of formation. No reasonable liberal policy in education can foist boundless choice on children, and hence communitarian misgivings about the hazards of such choice can be conceded by any reasonable liberal. Thus the alienation and unhappiness which communitarians claim are the results of boundless choices ought not to be as significant as they would expect.

The second point is that the argument that human happiness requires a strong sense of embeddedness to the exclusion of freedom is somewhat suspect. It is an empirical claim and not one which can be addressed satisfactorily in an inquiry of this nature. Yet it begs comment. In his novel *Flowers for Algernon*, Daniel Keyes follows the journey of Charly, a mentally handicapped man, who, through scientific intervention, is enabled to learn at a fantastic rate. He travels the road from simpleton to genius. Yet as he gains in insight, he becomes aware that the comments of his co-workers, which he had previously perceived as good-natured barbs from friends, were in truth cruel and malicious. In his anguish he asks the scientists, "Who is to say your light is better than my darkness?"

It is a question with which many educators must confess to have wrestled. Would it be better to be inducted into one way of life as a matter of course, and to avoid the messy business of daunting personal choices at every turn? Admittedly, not every self-avowed communitarian eschews the pursuit of reflective self-knowledge.[3] The catch is that if we accept this reflective ideal, we are back to liberalism. We can only create some distance between liberal and communitarian policy by assuming that the communitarian wants a relatively unreflective form of moral agency. The communitarian suggestion, then, is that human beings are happiest with a fixed 'me' which is reconciled to the standards and traditions of one's society. *Quaere* whether liberals inflict a disservice upon children by exposing them to alternatives and spinning the tectonic plates of personal identity.

Mill's comment in his essay "Utilitarianism" is pertinent:

> It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides (1962, p. 260).

Mill's argument is based on a qualitative rendering of different types of satisfaction. "Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification" (Mill, 1962b, p. 258).

It is not self-evident that it is better to be made a participant in formulating one's identity and life plan and be unhappy, or to inherit one's beliefs, values, traditions and community unquestioningly and be happy. The profound despair of which human beings are capable, that despair which leads some to prefer death to life, would seem to fly in the face of Mill's assertion. Some would gladly embrace a life of happiness in which they have had little part in fashioning their own ultimate beliefs and values.

The problem is perhaps that Mill invites us to compare apples and oranges. We might more profitably try to devise a common denominator. Reformulating the question then, is it better to be Socrates satisfied or a pig satisfied? It seems clear that human beings' ability to experience happiness from a vast repertoire of sources should increase their capacity for happiness. The difference to this point is a quantitative one: if I can experience satisfaction from a broad range of stimuli, surely that is better than if my pool of satisfaction is being drawn from a shallow wellspring.

Human beings are capable of reasoning in a sophisticated way. They are capable of experiencing a wide range of emotions including elation, regret, pride, and shame. They are capable of creating art from their thoughts and emotions. All of these faculties and more, allow human beings to experience forms of happiness different from that of pigs. What is crucial for our purposes is that the happiness which people derive from harnessing these faculties is intimately connected to freedom. It is only if we are free to reason that we are capable of experiencing the pride of reasoning well or the joy of epiphany; it is only if we are free to put ourselves in situations in which we are made to feel, that we can experience the happiness we can tap from the vast possibilities of human emotion; and it is only if we are free to express ourselves that we can experience the joy of creativity given free rein.

To be sure, communitarians do not advocate that human beings abdicate freedom entirely. There is still a consistent respect for the autarchy of individuals. Nevertheless, the communitarian practice to propagate a particular vision of the good and thus place the attainment of autonomy beyond the reach of most persons is a serious, and, I would argue, unacceptable cost. Neglecting autonomy as a possible source of satisfaction will abbreviate that list of things from which a person may derive satisfaction in his life. In purely quantitative terms, we have curtailed significant options which might give meaning to a human life.

The communitarian might counter that the option of an autonomous life does not quantitatively expand the choices from which a person might derive satisfaction. In fact, he might argue, autonomy will preclude one from experiencing the kind of happiness one might derive from the more simple life permitted by the acceptance of the traditions, values and beliefs of one's community. The concern that there is a certain angst which accompanies the life of constant reflection and self-scrutiny is not misplaced.

We can rebut the objection by arguing that education for autonomy merely keeps alive the possibility of another choice – another way to lead one's life. Autonomy cannot be foisted upon individuals without their own willing participation. Because this is the nature of autonomy, the analogy might be made to the addition of an entree to the menu. Although the restaurateur may present one or more delectable dishes, the diner is free to forego this, and to choose something else more to his taste, such as a dish of prepared values which has proven particularly popular with his neighbours. That is not to say that an education for autonomy will not, if successful, be instrumental in developing certain inclinations and tastes. If a child undergoes an education for autonomy, he will be more inclined to choose the autonomous life as the good life. If one is raised on spicy East Indian food, one will be more inclined to select a curried dish from the menu than, say, lobster. The point is that inclinations and tastes do not *preclude* one from sampling other options, so long as the menu caters to a broad range of appetites. The communitarian menu, by contrast, is a restricted one. Because a particular dish has been favoured by most, the chef offers nothing else. It is a good dish, by all accounts, but the chef brooks no specific requests for an extra turn on the spit or calls to substitute pasta for potatoes.

In the context of education, the communitarian objection is premature. Autonomy *may* preclude one from indiscriminately absorbing the values and beliefs that are currently de rigueur, but until a person self-consciously *chooses* a rare cut of autonomy, she is still perusing the menu. Ostensibly, communitarians are concerned that the unwitting diner might be served a platter of autonomy the moment she is seated, forever preventing her from having feasted on a communitarian proffering. But, if one examines the communitarian argument, it is clear that they would condone that same presumptuous practice, but with a different communitarian dish. The liberal waiter is one who would permit the patron to peruse the menu at her leisure before making her own selection.

The communitarian might then object to the development of the predisposition to choose the autonomous life that an education for autonomy would promote. It is conceded that an education for autonomy changes character – that is the *point* of an education of this kind. But is it impermissible to manipulate children's inclinations such that the likelihood of choosing to live in an autonomic way is bolstered? I shall return to this point later in this chapter in the context of a discussion concerning the availability of the religious life, but a brief comment now may be pertinent. I argued in the previous chapter that persons ought to be permitted to make good choices in their lives, and that this necessarily entails the ability to examine the beliefs and values which form the impetus for one's decisions. When a child is exposed on a daily basis to an ambiance of respect for reasons, the likelihood of her succumbing to and internalizing such a respect is enhanced. The difficulty is that unless a child is exposed to an education for autonomy and (possibly) develops the inclinations which underlie autonomous lives, the autonomous life is not a possibility *at all*. Unless one is prepared to make the dubious leap to saying that children ought not to be educated in such a way as to allow them to make good choices in their lives, one is committed to permitting an education for autonomy. *An education for autonomy, which nurtures certain inclinations, is the least invasive way of providing access to the autonomous life.*

A final caveat: I should not be misunderstood to be saying that the maximization of options on the menu determines the value of the menu. In other words, fifty selections is not necessarily better than five alternatives – one cannot elude questions of quality. Without becoming mired in a discussion of the relative merit of different options, I shall make the more circumscribed claim that, because of the enormous importance of enabling individuals to make good decisions in their lives, the opportunity to lead an autonomous life must be included on any menu which purports to offer high quality fare to discriminating palates.

It is clear from Mill's earlier comments that he perceives a strong nexus between autonomy and the highest forms of happiness of which human beings are capable. That pigs might squeal their delight at being served a tantalizing portion of slop, he would argue, would not change the fact that it is slop that they are being served. In order for human beings to achieve the highest forms of happiness, they must befriend freedom and rely upon it to question their own fundamental beliefs and values.

The justification Mill provides to defend his conception of the highest forms of human happiness, however, is inadequate. Who is to say that the happiness one might derive from the autonomous life is 'higher' than the happiness one might load up on from the communitarian banquet? The response begs the question. I make no secret that I agree with Mill, but the matter need not be resolved in order to put to rest the question of whether or not we ought to educate for autonomy. *Even* if the communitarian is right and autonomy is the harbinger of a life of unhappiness, we cannot remove it from the process of education without offending our core intuitions. As Richard J. Arneson and Ian Shapiro (1996)state:

> But people do not merely wish to live a valuable and worthy life according to their current beliefs about what constitutes such a life. They want to lead a life that truly is valuable and worthy. Insofar as critical reflection on one's present values is a useful means to acquiring values that could withstand informed critical reflection and that would be a reliable guide to a valuable and worthy life, one's basic goal of living a good life generates the subsidiary goal of developing and exercising critical reflection. This, as we have seen, is the core defensible aspect of the ideal of autonomy (pp. 399-400).

When we get down to the crux, it is an unfortunate thing to be unhappy, and, to be sure, making choices concerning one's beliefs and values is a burden which can occasion much discomfort and even grief. But to deliberately circumvent educating for the *possibility* of autonomy seriously belies respect for persons, as it forecloses the fundamental tenet of allowing persons to govern their own lives and to allow them to seek to make good choices in that pursuit.

This is an unusual claim, for communitarians cannot be reproached for ignoring the autarchic character of persons – on this count, liberals and communitarians agree. Nevertheless, when communitarians frame the question in the language of happiness or autonomy, then opt for the former to guide our educational policies, I contend that they undermine their own fundamental commitment to autarchy. It is not open to us to abandon our status as moral agents, this is agreed. Choices of all kinds will confront us at every corner, and even the inclination to turn away is a choice. The myriad decisions we will make in our lives will surely be peppered with the kinds of choices that will lead us either toward or away from autonomy; the choices will not only be those respecting the kind of job we desire, or the avocation which will occupy our time, but also choices concerning our beliefs and values, for these are ubiquitous. To walk past these is to make a choice as surely as minding them is. Certainly the communitarian cannot be taken to say that our education system must seek to blindfold children from these types of questions.

If that is so, then the communitarian is hard-pressed to explain why the education to assist persons in making good choices concerning the *projects* in their lives (as communitarians certainly advocate) should not be extended to encompass making good choices concerning their fundamental values and beliefs. Autonomy itself is a project, in the broadest sense of the term. Few communitarians would be sufficiently Machiavellian to deliberately expunge the opportunity of the autonomous life. Given that, it will be difficult for them to justify why children should be educated to make good choices concerning superficial decisions, and not regarding the fundamental beliefs in which they are embedded and which will be called into question perhaps as often. Such a two-tier system is unconscionable, and undermines the autarchic choice to lead the project of an autonomous life. It undermines the person's interest in being educated to make good choices as much in this sphere as in other spheres touched by the autarchic life.

Whether they are so inclined or not, communitarians must make at least grudging concessions to education for autonomy if they are to remain true to their fundamental commitments. Imagine a parent who had wished all his life that his son would follow in his footsteps and become a hockey player. But try as he might, he is unable to persuade his son to take this route. The son has cast his gaze steadfastly on a career as a poet. Although the father would be disappointed, surely he would recognize that his son's life is his own to lead, whatever his own aspirations might have been for the son. Furthermore, if the father is truly concerned for the son's welfare, he will certainly want him to be the best poet he can be. Similarly, communitarians may have a specific point of view about what is valuable, but their commitment to autarchy will permit them to bend to the individual's own conception. And given that communitarians cannot make the possibility of the autonomous life disappear with the wave of a wand, their commitment to autarchy must lead them to an education for the possibility of autonomy.

The communitarian argument that the liberal emphasis on freedom is bad because it may preclude a life of happiness by fostering the alienation which springs from a lack of uniformity of ends, is misguided. As an empirical claim, it dismisses the possibility that the freedom required for agency may be essential to attaining the highest happiness of which persons are capable. It is possible that communitarians err in identifying societal alienation as a significant detractor from happiness, and in suggesting that freedom must be beaten down in order to ensure that all members of the community are *ad idem* vis-à-vis ultimate ends. In fact, freedom may be the best way to achieve personal happiness *and* social harmony. But even if they are correct, they cannot justify skipping over education for autonomy. If we recognize the importance of allowing persons to choose, we cannot escape the fact that not only are some choices clearly better than others, but that some individuals are more capable of making better choices than others. If we value good choices and the ability to make good choices, we must educate for good decisions in both autarchic and autonomic matters.

We turn now to another communitarian criticism of liberal theories which arises from misconstruing the role of freedom in liberalism. Charles Taylor bridles at the perceived liberal claim that the freedom to choose our own projects in inherently valuable. Being free to question all our social roles is self-defeating, Taylor says, because "complete freedom would be a void in which nothing would be worth doing, nothing would deserve to count for anything. The self which has arrived at freedom by setting aside all external obstacles and impingements is characterless, and hence without purpose" (1979, p. 157).

Kymlicka rejects Taylor's interpretation of the role of freedom in liberal theories. Concerning Taylor's claim that instead of freedom for its own sake, there must be some project that is worth pursuing, Kymlicka clarifies:

> [T]he liberal defence of freedom rests precisely on the importance of those projects. Liberals do not say that we should have the freedom to select freedom for its own sake, because freedom is the most valuable thing in the world. Rather, our projects and tasks are the most important things in our lives. And it is because they are so important that we should be free to revise them, should we come to believe they are not worthwhile...Saying that freedom of choice is intrinsically valuable suggests that the more we exercise

> our capacity for choice, the more free we are, and hence the more valuable our lives are. But that is false, and indeed perverse. It quickly leads to the existentialist view that we should wake up each morning and decide anew what sort of person we should be. This is perverse because a valuable life is a life filled with commitments and relationships (1990, p. 209).

Despite some suggestion in liberal theory that liberty is valuable in itself, I believe that such a theory is inadequate, particularly in an educational context. Rather, moral agency as the unshakable human condition requires that we adopt an *instrumental* justification of liberty. This, however, does not demand that we abandon the liberal point of view. It simply acknowledges that liberty is a handmaiden to autonomy. The objectionable point of communitarianism is not that it asks us to relinquish our liberty, but that, in so doing, we compromise our status as autonomous beings.

The communitarian would have it that the pertinent question is not 'What should I be, what sort of life should I lead?' but 'Who am I?' One does not choose one's own ends, but discovers them, not "by choosing that which is already given (this would be unintelligible) but by reflecting on itself and in inquiring into its constituent nature, discerning its laws and imperatives, and acknowledging its purposes as its own" (Sandel, 1982, p. 58). For Sandel, the problem with liberalism is that it presumes we are free to, and capable of, detaching ourselves from our self-defining commitments and projects in order to critically assess them. But what are the implications of a theory which does not abide some notion of reflective detachment? Macedo posits that the antithesis of reflective detachment would be strong constitutive attachments which would preclude the critical reflection on which liberalism depends.

This denies either the possibility or desirability of any reflective distance at all between the moral subject and its defining 'constitutive commitments' (1990, p. 244).

This violates our own intuitions concerning our self-identity. We do not consider ourselves to be prisoners, bound by the manacles of our constitutive attachments and goals. Rather, we adhere to them because, in our *judgment*, they are worthy attachments and goals to have. Whether or not we can actually cut ourselves adrift from these attachments may be a moot point. The point is that we typically believe that if our attachments and goals are unworthy, we are free to revise or discard them.

As Kymlicka points out,

> [O]nce we agree that individuals are capable of questioning and rejecting the value of the community's way of life, then the attempt to discourage such questioning through a 'politics of the common good' seems an unjustified restriction of people's self-determination (1990, p. 215).

If individuals can and do engage in the exercise of examining their ends, the onus falls upon the communitarian to show that it is inappropriate to foster the conditions conducive to examining well. The alternatives are that, as a society, we ought to be indifferent to whether people examine well, or that we ought to encourage them to reflect badly. Neither alternative would seem to be palatable.

The trepidation which communitarians express at liberal detachment is unwarranted. No one is advocating that we ought to bare ourselves of all our attachments and cast them off in one indiscriminate striptease. This is likely not even possible. But certainly individuals are capable of reflecting upon one attachment at a time. That this may expatriate the individual from his community may not necessarily be cause for regret. Stephen Macedo states:

> We should limit our loyalties in the name of the basic, impersonal requirements of liberal justice. The liberal citizen may be required to renounce commitments to friends, country, or both in the name of political morality. It all depends on what one's friends and country are up to. That does not mean that we must, as lonely individuals, step beyond the pale of all community attachments, it means rather that one community we always belong to is the community of reasonable persons. Liberalism requires that we regard our projects and commitments from the perspective of others, from outside ourselves and our narrow circle, but not outside all communities of the human world (1990, p. 250).

Paradoxically, the disengagement from society with which communitarians are concerned is belied by the even greater embeddedness this entails. The communitarian's monistic conception of the good life promotes embeddedness only where that single conception flourishes. In any pluralistic society, a monistic conception of the good life which encourages rampant proselytization is divisive. It is in a pluralist society with a passport of tolerance and open-mindedness where the liberal will find embeddedness, and where the communitarian will be more susceptible to alienation. Macedo eloquently makes this point:

> Liberal reasonableness and reflection do not provide metaphysical ladders for persons seeking to climb out of this world; rather, they define the proper aspirations of persons making their way in a pluralistic society mindful that others have projects and lives of their own (1990, p. 248).

Finally, it is in the crucible of justice where the communitarian theory proves itself inadequate. In his seminal work on communitarianism, Alasdair MacIntyre takes the necessity of adherence to tradition one step further. Going beyond the claim that adherence to traditions is necessary if our lives are to have meaning and coherence, he argues that it is only by immersing ourselves in the knowledge of traditions that we can achieve sound reasoning about justice. MacIntyre proposes that we find justice and rationality "embodied in" social and intellectual traditions and that these are "essentially historical. "To justify," he says, "is to narrate how the argument has gone so far" (1988, p. 8).

MacIntyre can perhaps be forgiven for putting forward what threatens to be a culturally relative theory of justice. Although he does not theoretically rule out the possibility of objective cross-cultural moral judgment, practically speaking, his culturally emergent idea of justice shrouds cultural practices in a protective cocoon. It is less than charitable to submit other cultures, both present and past, to the same standards at which we have arrived in our own society and in our time. But to say that such a practice is unfair is not to say that we cannot scrutinize the justice of a society from a detached point of view. Rather, it is to say that different practices emerge in different contexts for different reasons and that any assignment of blame for shortcomings must be done gingerly. The claim of cultural difference is to understanding and charity, not to absolution or apotheosis.

Michael Walzer argues that the 'shared understandings' of each culture are the bases upon which principles of justice should be founded. "Justice," he says, "is relative to social meanings…A given society is just if its substantive life is lived…in a way faithful to the shared understandings of the members" (1983, p. 312). Walzer's conception is framed in language similar to that of MacIntyre's, but it is premised upon an underlying bedrock of equality. Where 'shared conceptions' do not presume equality, their very claim to communal assent is precarious.

Susan Moller Okin elaborates:

> Both MacIntyre and Walzer object that Rawls's theory lacks force because we are never in the original position. But their alternative, contextually based theories, building on the prevailing ideologies of male elites, lack moral force because their neglect of domination leaves the rest of us deprived of a voice in the construction of morality. The traditions of 'our' patriarchal past have been of major significance in the perpetuation of the gendered social structures and practices that have resulted in continuing and serious injustices to women. Theories of justice that depend on traditions or on shared meanings – even if their intent is to be critical – cannot deal adequately with the problem of domination (1989, p. 72).

Walzer suggests that counter-ideologies come to the fore through resentment and resistance (p. 12). But, as Okin points out, this means that the possibility of social change rests on the flourishing of dissent. The problem is that the more thorough-going the dominance and the pervasiveness of an ideology, the less the likelihood that the prevailing system will be resisted (1989, p. 64). Indeed, dissent depends on the cultivation of autonomy, but an education that privileges shared understandings over autonomy blocks the dissent which the moral connection of tradition requires. It is at this point that communitarianism must collapse into liberalism in order to accord with our core intuitions. Any theory of justice which fails to have in place mechanisms to ensure that persons are treated with equal respect by virtue of their equal status as agents is inadequate.

> The capacity for reflective detachment from particular desires, projects, and commitments is what allows us to understand and conform with justice and to devise and pursue a conception of the good life...The capacity for reflective detachment helps us put a brake on our own pursuits and respect the equal rights of others (Macedo, 1990, p. 245).

Autonomy and Spiritual Fulfillment

Communitarian arguments have tended to emphasize the individual's relationship with the community as a focal point of rejection of liberal arguments for autonomy. But typically in materials access issues in education, another kind of argument surfaces, often in tandem with communitarian arguments, one which places spirituality at the centre of human life. The suggestion is that nurturing autonomy in the individual through our educational institutions will preclude certain modes of spiritual life.

In the 1972 case of *Wisconsin v. Yoder*, the United States Supreme Court permitted the Old Order Amish in Wisconsin to remove their children from school at the age of fourteen despite mandatory attendance laws to sixteen. Old Order Amish hold a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. They objected to high school because children would be exposed to a worldly influence in conflict with their beliefs. Insisting that children attend school until the age of sixteen would jeopardize the Amish community as a significant correlation existed between the number of years of schooling and the likelihood of defection from the Amish community.

Shelley Burtt makes an astute observation regarding cases such as *Yoder*. She suggests that while many liberals feel the case was decided wrongly, this may be because of a misinterpretation of the motivation of parents. The decision is viewed as one which indulges insularity and intolerance. The parents' point of departure, however, is one of cultivation of religious faith, to which we ought to be more sympathetic. Viewed from this perspective, there is a greater incentive to defer to parental wishes to try to instill in their children a sense of the transcendent. We should see parental requests for accommodation as commendable efforts to impart an appreciation of the spiritual in the face of an aggressively materialistic culture (1994, p. 63).

> What we see as intolerance of differing views of the world is, from this perspective, fear of the corruption of faith. What seems to us instruction in critical rationality can seem to some parents an education that might undermine their child's growth in grace (Burtt, 1994, p. 64).

Burtt's intent seems to be to garner sympathy for these laudable parental intentions, and to allow this sympathy to sway support for deference to parental wishes. It is worthwhile to distinguish the typical parental support in these cases from a sinister intentional subversion of civic virtue. Recognizing the good intentions of parents should temper our assignment of moral culpability and perhaps dictate an approach less like a crusade than a respectful, and even regretful, polemic. But what springs from Burtt's discussion (although not explicitly) and which is ultimately of greater interest to us is the empirical question of whether the development of autonomy effectively forecloses access to a spiritual life. It would be precarious indeed to suggest that the best way to achieve the spiritual life is through rational deliberation and autonomy. It would be a trenchant criticism of education for autonomy that those individuals who were educated to this end were barred from embracing and participating in a spiritually satisfying life. This conclusion, however, is not foregone, and bears closer examination.

The criticism must rest in some way upon the inference that one or more of the qualities which we ascribe to persons who epitomize the spiritual ideal are mutually exclusive of one or more of the qualities which we ascribe to persons who epitomize the autonomic ideal. Of those characteristics of autonomous persons which might be objectionable, two would appear to be the most likely candidates: the ability to think critically and the disposition of open-mindedness. My argument in the next chapter will be that there exists a close nexus between these two dispositions, and so an attack on one will necessarily implicate the other. The argument which is sometimes made with respect to critical thinking is that the emphasis on ratiocination leads one to submit spiritual questions to the same kind of empirical scrutiny which we would use to analyze the molecular structure of a cell. To do so might lead one to the conclusion that God does not exist or that Jesus was not the Son of God or that the soul is a fabrication of mortals afraid of anonymity.

But it is puzzling why one should think that critical thinking necessarily leads away from the transcendent. At best, the rationalist must admit that he does not know. By their nature, questions of this kind defy being pithed and dissected, data recorded as they filter through our senses of touch, smell, taste, sight and hearing. It is beyond the scope of this project to delve into the nature of metaphysical phenomena. Nevertheless, to meet the argument, we must first be satisfied that rationalism and the spiritual life are not mutually exclusive. Unless the moralist can say, "there is no God because such a proposition *contradicts* reason," then the *possibility* of the coexistence of the spiritual life and critical thinking remains alive.

It is another question, however, whether the two can be companionable bedfellows or whether each might merely tolerate the presence of the other. Although indulging in critical thinking does not logically preclude the spiritual life, does it make it so unlikely in a practical sense that we might say that critical thinking is effectively destructive of modes of life which emphasize the transcendent? Consider the cynic who will accept nothing as true, save as it is supported by empirical evidence. This is the typical example given of the rationalist who relies solely upon critical thinking to make his way. I have already conceded that education should be conducted in a manner that is open to the spiritual life. But is it open *enough* if education for autonomy merely leaves it as a bare *possibility* that autonomous adults might, at the end of the day, entertain belief in God?

There is something disturbing about the conflation of critical thinking and a life barren of spiritual meaning. Two possibilities exist: either it is possible to devise a rational justification of God, or it is not. If indeed it is possible, then it is illogical to argue that teaching children critical thinking will seduce them away from the spiritual life. Rather the use of reason could lead one to spiritual maturity. Yet even if one could not, despite one's best efforts, contrive a rational justification of God, it is specious to argue that this ends the matter. The misunderstanding lies, I think, not in the conclusion that many rationalists eschew the spiritual life, for this depiction is more than mere caricature, but in thinking that spiritual deprivation must be an inevitable result of education for critical thinking. The error lies in our belief that the two are like magnets which repel each other and in modeling our education of children after that assumption.

It is at least plausible that spiritual matters are not on the same plane as mundane matters, and it is a disservice to perpetuate the questionable wisdom that their value can be judged according to the same criteria. The purpose of reason is to objectify something, to examine it critically from a distance. But passion, for example, or spirituality, resist this kind of objectification. Recourse to this abnegates their very raison d'être, which are by nature, subjective experiences. Ultimately, there may be very good subjective grounds for holding certain spiritual beliefs. But because these are, by their nature, subjective reasons, they are not transferable to the public realm. To say that these reasons are not transportable to the public realm is not to be dismissive of religious experience, but simply to acknowledge their intensely personal nature as reasons to act.

Soren Kierkegaard argues in his *Religious Discourses and Exercise in Christianity*, that the more concrete and positive we are in speaking about God, the lower is the level of comprehending Him. Matters such as this may reside in the interior and spiritual realm, where they defy direct expression and elude logical deductions. Belief of this kind involves not so much a retreat from rationality and reason as their transcendence. But this does not mean that the spiritual person has no need of rational critical skills. Indeed, the religious person, if he is to lead a moral life according to his faith, cannot abdicate the role of reason in that process. No religious creed can account for all possibilities in establishing a moral doctrine – there will always be gaps which the believer must fill in. In other instances, the believer might discover a moral conflict in two different religious tenets which does not come to the fore until a particular context pushes it there. Finally, the believer may encounter conflicts between what he has come to accept as revealed truth and his own worldly experience. Kierkegaard's description of the leap of faith envisions the emphasis of feeling and commitment in grasping the transcendent, particularly as it forms the most fundamental convictions of our belief systems. Having a firm commitment to reason does not detract from this, and in fact, can help to shape one's theosophy into a coherent whole.

An education for autonomy may predispose one to choose to lead a self-determined life. But this does not mean that the inclination to do so cannot be defeated (where it conflicts with religious beliefs) by religious experience. Many people experience a kind of spiritual epiphany which is momentous enough to change their lives. Indeed, some religions insist that this kind of 'born-again' experience is essential to religious commitment. An education for autonomy cannot prevent the possibility of religious experience, although it may make one wary of cultish religious involvement.

If there is merit to this argument, as I think there is, then schools do not embark on the perilous path to critical thinking flanked by spiritual voids. In the vast majority of our day to day interactions and transactions, the use of reason and critical thinking implicated by autonomy is indispensable. Schools go wrong to the extent that they attempt to catch in their critical thinking web, flies which are unpalatable and indigestible by that standard.

If the kind of education required for autonomy does not preclude as a matter of course the kind of leap of faith envisaged by Kierkegaard or the life of worship, adherents may nevertheless be breathing too hasty a sigh of relief. Many spiritual beliefs transcend reason, but some will also defy reason, and will have to be dealt with, and possibly discarded as anachronisms by the autonomous person. Many faithful adherents will object to this practice as vehemently as to a wholesale rejection of one's faith, for it is not the prerogative of the faithful to pick and choose their religion.

The point of autonomy is that it recognizes and then builds upon our status as moral agents – as choosers of projects. The minimal requirements of personhood extant in the autarchic life blossom into the ideal of autonomy out of the loam to equip persons to make good decisions. These must be based on a fair assessment of alternatives; but more than that, they must call into question those beliefs and values which precipitate action. The interest in having the capacity to make good decisions is a strong one indeed, and to wrest this from the hands of persons, even in the name of spirituality, is to compromise their status as moral agents worthy of respect. This is not to say that nonautonomous persons have been divested of moral agency, but that, out of *respect* for moral agency the *possibility* of the autonomous life must be proffered to children. Our status as agents is *a priori*, for it makes no sense to speak of a person's spiritual life without first presuming a moral agent capable of choosing, leading, and benefiting from that kind of life. Just as the opportunity to choose the spiritual life flows from autarchy, so too does the opportunity to choose the autonomous life. Since the autonomous life and the spiritual life are not mutually exclusive, and there is space for both to co-habitate, the bone of contention is that area over which there is an overlap. I propose that the capacity for autonomy takes precedence within the context of education.

Eamonn Callan argues that it is an error to think that no essential tension exists between the rational-critical principle and serious religious engagement. This is so because

> …wholehearted acts of religious worship cease to be possible when serious doubts are harboured about whatever beliefs are explicitly affirmed or presupposed by the acts; and since no plausible view of the epistemological roots of any substantive set of religious beliefs can be *so* favourable that all serious doubts are dispelled, it follows that conformity to the rational critical principle must impede personal engagement in worship (1988, pp. 184-5).

He later adds:

> But unless our epistemological generosity is to degenerate into sheer prodigality, it cannot be maintained that the rational grounds for my religious convictions could be enough to secure the degree of assurance whole-hearted worship demands (p. 186).

The incompatibility will rear its head whenever available evidence and argument do not preclude reasonable doubts. He punctuates this argument by pointing out that all sets of religious beliefs leave extensive latitude for reasonable doubt. The prognosis, ultimately, is that the life of worship will wither under the bright gaze of rational criticism.

I think that Callan underestimates the capacity of both religious faith and doubt spawned by the rational-critical principle to exist in tandem, despite an essential uneasiness. He places the bar too high when he sets the standard as one which admits of no reasonable doubt. Few, if any, religious adherents can claim a faith so strong that it entertains no doubts. Firstly (as Callan later acknowledges), there may be a group of reasons for belief which one could call secondary, which support one's faith. Apart from reasons (both transcendant and empirical) which support one's faith directly, there are other reasons for religious engagement. These might include the human desire to feel one's own significance, the human fear of isolation or loneliness, the need for optimism, the need for the guidance of a creed in one's life, and even the need for the social structure of the church family. These would be largely insignificant where evidence clearly refuted religious claims. But the countervailing evidence which might give rise to doubt is itself hardly decisive. In that case, doubts about, say, the existence of God might be assuaged by the person's need to believe in the existence in God. This holistic view of reasons leaves room for passionate engagement despite concerns which might grow out of the rational-critical principle.

Furthermore, even if critical scrutiny were to make room for doubt regarding one's beliefs, we need not conclude that the life of worship is no longer an alternative to those who abide by the rational-critical principle. Doubt is not always a static and pervasive quantity. Undulations of doubt and belief ebb and flow with the passage of time and the events which transpire in our lives. It is true that a religious life immersed continuously in doubt without respite will become a diluted and watery faith (to use Callan's phrase). But in the complexities of a human life, islands hospitable to faith and worship may surface during temperate seasons and alternately, sink into the ocean during pluvial seasons of religious doubt.

The tendency has been for secular institutions either to ignore spirituality altogether, or to annex it as territory subject to the same kind of rational scrutiny as mundane affairs. The corresponding tendency of many religions has been to claim spiritual sanctuary for anything which might be captured by 'religious life.' Both stances are too extreme and a call for moderation may be more salutary. People should at least have the *opportunity* to examine how they live the spiritual life, even if practices and customs are said to emanate from authoritarian religious dicta. Since moral virtue presupposes choice, there is no moral nobility in blind obedience which short-circuits our reasoning capacities. One might as well praise the sheep for heeding a sheep dog's nips to the heels. As long as there remains room for the transcendent in our lives, the ideal of enabling persons to make sound decisions in *all* aspects of their lives is pre-eminent.

That some religious ways of life will cease to flourish under the critical scrutiny of its members is inevitable. But every way of life does not have an absolute claim to perpetuation and reproduction, religious ways of life any more than secular ones. Those who would claim that religious practice is inseparable from core religious beliefs are not entirely wrong. Some modes of religious practice become the anomalous focus of the spiritual life rather than the core beliefs themselves. These may not weather the deep reflection of the autonomous person of faith, and to that extent are vulnerable. But not all religious belief is of this type, and that which coheres with practice that abides these beliefs will remain intact. Ultimately, what ought to make the idea of education for autonomy palatable, even to those who are devoutly religious, is that education only opens the door to the autonomous life, albeit with a gentle nudge. Eviction is not contemplated – the choice to remain securely close to the warm hearth of religious doctrine or to step outside of a particular way of life into the blustery ambiance of self-scrutiny remains with the individual. Joseph Raz makes the point:

> Since autonomy is morally valuable there is reason for everyone to make himself and everyone else autonomous. But it is the special character of autonomy that one cannot make another person autonomous. One can bring

> the horse to water but one cannot make it drink. One is autonomous if one determines the course of one's life by oneself. This is not to say that others cannot help, but their help is by and large confined to securing the background conditions which enable a person to be autonomous. This is why moral philosophers who regard morality as essentially other-regarding tend to concentrate on autonomy as a capacity for an autonomous life. Our duties toward our fellows are for the most part to secure for them autonomy in its capacity sense (1986, p. 407).

There is a built-in check to an education for autonomy. We cannot 'make' someone autonomous – by its nature, autonomy requires the agent's willing participation.

To the extent that an education for autonomy simultaneously develops the inclination, as well as the capacity, to critically self-reflect, it is morally defensible educate in this way. Richard Arneson and Ian Shapiro write:

> [L]et us suppose that the child's future can be represented as a choice between just two options, a 'religious traditionalist' and a 'secular worldly' way of life. No assumption is made about the relative value of the two options, but it is assumed that the individuals differ in their traits so that for some individuals, the secular way of life is better, and for some, the traditionalist way is better. The differences among person that render one way of life or another superior for them cannot be identified in advance of maturity by guardians or by the individuals themselves. To some unknown extent the withdrawing educational program renders the recipient fit for the traditionalist life and unfit for worldly life, whereas a secular education to some unknown degree renders the recipient fit for worldly life and unfit for traditionalist life. The choice of an educational program also can affect the child's capability and desire to engage in well-informed critical deliberation issuing in a choice of values and a way of life. At maturity the individual will choose a way of life autonomously or nonautonomously, where choosing one way or the other does not affect the value of the option that is chosen. But it is assumed that choosing after well-informed critical deliberation, or autonomously, increases the probability that an individual will choose the way of life, secular or traditionalist, that is better for her. On these assumptions, the better course for a guardian is to choose a secular autonomy-promoting educational program for the child…In this model, autonomous choice is not itself an element of the good life, it is merely a device for discovering the good life. Still, this instrumental value of autonomy suffices to show the superiority of an education that promotes it to one that does not when educational choice must be made *ex ante*, before the individual's type is known (1996, pp. 401-2).

Ultimately, the child may reject that option in favour of other ways of attaining the good life. But it is only by opening the door to autonomy that we can properly show respect for the minimal *autarchic* character of persons by allowing them to accept or repudiate autonomy, both as a tool in finding their way in their own private lives, as well as a requirement of a robust civic involvement. From this point of view, respect for persons is complemented by sufficient room for the flourishing of religious ways of life, marginally restrained though they may be.

Liberal Neutrality, Perfectionism and Paternalism in Education

That the autonomous person may nonetheless have access to spiritual ways of life is an important conclusion. It means that autonomy as an ideal need not be displaced because of a concern that autonomy will condemn one to a life of spiritual decrepitude. Likewise, the ideal of autonomy withstands the communitarian assault. But, having acknowledged the import of autonomy and its place as an ideal, to what do we commit ourselves? Macedo makes the point that

> ...while the liberal ideal of autonomy helps us to live up to the demands of liberal citizenship and helps us to flourish in a diverse and open society, it is not mandatory. We should respect persons, those capable of making lifeplans and acting justly, and not only those who successfully strive toward the ideal of autonomy. One who unquestioningly and single-mindedly pursues a career marked out for him by his parents rather than experimenting with different projects and reflecting critically on other possible goals and aspirations, forgoes the liberal ideal of autonomy but not the status of responsible personhood (1990, pp. 229-230).

It is often claimed by liberals that the state has a duty of non-interference vis-à-vis the private lives of its citizens. This principle is captured in the principle of state neutrality. Proponents of neutrality would claim that anything less would be an abdication of the liberal principle that reasonable people differ with respect to conceptions of the good, and that as a matter of justice, these different conceptions ought not to be thwarted by the state. But to what does liberal loyalty to neutrality commit us in matters of education, and more particularly, will it foreclose the possibility of embracing the liberal virtue of autonomy in our educational institutions?

The idea of state neutrality toward its citizens' conceptions of the good might call up several scenarios. Firstly, in formulating curricular policy, one might suppose that the state may be enjoined to expose children to ideas and materials indiscriminately. In that way, no one view is promulgated over another. Alternatively, the state may have no obligation to expose students to *anything* so long as it attempts to maintain a similar ignorance in students to all different ways of life. Finally, the state may be bound to reticence and simply to let the chips fall as they may, permitting students to come into contact variously with ideas, images and literature as may cross their path through random student, parent, and teacher choices. The question, of course, is whether any of these alternatives we might envisage as a consequence of strict state non-interference in materials access issues might be defensible. In my view, none of these alternatives is tenable.

One can readily discern the need for state neutrality. It reflects the state's equal regard for citizens as moral agents. In this same vein, neutrality is the liberal state's response to the value that persons ought to be free to lead their own lives and pursue their own good in their own way, free from unjustifiable state intervention. What fetters the state is the recognition that all persons possess the capacity for moral agency, the capacity to conceive values and projects and the strong interest to exercise these capacities in leading a life of one's choosing. In other words, each person has a life to lead over which he alone is master, as it is within that person alone that a world of unique interests resides to which he alone is privy, and to which no one else can claim an intimate knowledge. In the political context, the principle of state neutrality captures the liberal democratic notion that a society which is given room to grow in response to the self-chosen ways of life of its members fosters reasonable pluralism, a state of affairs which is healthier and more adaptable to cultural stresses than monistic societies.

But neutrality is defensible only to the extent that it continues to serve the interests it is designed to protect – the self-determining character of persons. Furthermore, when it comes into conflict with other legitimate interests, we must take a hard look at both competing interests. Neutrality serves important liberal ends; at the same time, it has the power to jeopardize other (and sometimes even the same) liberal ends if not properly conceptualized. The challenge is to arrive at a place which does not force us to steal from liberal Peter to pay liberal Paul.

The lesson we should take from state neutrality is that it is perilous for the state to dictate the contents of the good life to its citizens. This is an affront not only to our status as persons, but also to the active role citizens play in creating the society in which they live. But if the touchstone for state neutrality is the respect owed to persons to be self-determining agents and to engage effectively in public deliberation, then a paradox emerges: Those reasons which lead to laissez-faire state non-intervention in the case of adults are the same reasons which will elicit state intervention in the case of children. *It is inconsistent with the future ability of* *children to make sound, self-determined choices in their lives that the state refrain from participation in educational curricular design.* Indeed, the *reasons* for state neutrality do not emerge unless we are speaking of persons capable of directing their own lives – a milestone which children do not reach immediately. In education, then, the proper place for state neutrality is to say that, in anticipation of their future status as self-directing and self-determined persons, the state must do (or not do) those things necessary to enable children to eventually seek their own good, and to eventually participate effectively in public discourse. This will entail the exercise of paternalism by the state in the best interests and for the good of the child.

The issue arises, of course, when the state may act paternalistically toward its citizens. "Raising the threshold of personhood too high," Macedo states, "or building in thick substantive criteria, sacrifices the logic of respect for persons to the logics of perfectionism and paternalism, and risks, as Berlin warns, equating freedom with despotism" (1990, p. 232). Many adults never achieve autonomy, but most are at least autarchic, and if we impose greater restrictions upon them, they may forever have to lead their lives according to another's plan. As Raz points out, there comes a time when it is more important that a moral agent make his own decisions than that they be the best choices.

But the justification for non-interference in the decisions of autarchic adults is much weaker in the case of children. The question is largely one of degree, but one which is so significant that it becomes a qualitative difference. Laura Purdy describes the differences thus:

> [T]he nature and scope of the decisions the two groups make are rather different: a much larger percentage of the decisions children make are momentous in their consequences for the child's later life and at the same time revolve about values that ought to be regarded as uncontroversial. What I mean is this. Adults quite often face different and important questions: where should I live? What kind of work would be best? Should I marry this person? What about having a child? And so forth. They are operating, however, from a base of relatively settled questions – questions about who they are and what they can do…To the extent that children are as yet unformed, they have the potential to develop in a variety of ways, some much less promising of future well-being than others. Especially important to them is a certain class of skills, habits, and goals that play a large role in determining what choices will later be open to them as well as the satisfaction they will enjoy in life (1992, p. 45).

Implicit in the fact of mandated compulsory education is an understanding of the child as a person who has ground to cover before being accorded the kinds of freedoms which accompany the status of adulthood. This is an explicit abandonment of the laissez-faire attitude with which we typically approach the choices of adults. Once we accept that education is necessary to some extent (and important enough to override the objections children themselves may have), we must then ask to what extent the state will be permitted, and indeed duty-bound, to exercise its paternalistic authority.

If we recall the three possible manifestations of strict state neutrality in curricular selection alluded to earlier, we see that none of these properly serves the interests that state neutrality was designed to serve. To flood children indiscriminately with a deluge of materials, and refuse to assist them in constructing a morally seaworthy vessel fails to properly equip them to eventually chart their own course; to uniformly withhold all materials which may not only inform them of possible life options, but which will provide material for critical scrutiny is similarly negligent; to leave the process of curricular construction to the tides created by the gravitational forces of the random decisions of parents, educators, community, and children also ignores the interests recognized by the principle of state neutrality. State neutrality cannot legitimately be interpreted to mean state non-intervention in educational matters, but must be understood to mean some positive duty to act.

The difficulty is that if the state undertakes to paternalistically make the choice to expose children to an education for autonomy, it may be accused of inculcating a particular vision of the good life. A perfectionist state is one which sees no principled objection to promoting the good of its citizens. Perfectionist liberalism holds that the autonomous life is intrinsically valuable and that autonomy is a necessary condition for a good life. Raz (1989) argues that it is proper for the state to promote certain visions of the good life, and notably, the ideal of personal autonomy is a good to be promoted in the liberal state (p. 1231). But I need not defend this more radical position. Indeed, there may be very good reasons to inculcate the virtue of autonomy, and that argument may very well be persuasive. But it will be a difficult position to sell politically when one considers, for example, the large numbers of religious parents who do not share this vision of the good life. I think an argument can be made which sacrifices little in terms of the substance of education which will enable students to participate in the democratic process and to make autonomous choices in their own lives, but which is not premised upon the contentious perfectionist view that the autonomous life is intrinsically more valuable than other ways of life.

A less contestable argument lies, I think, in conceptualizing an education for autonomy not as a process for propagating a particular perfectionist view of the good life which necessarily *entails* an autonomous life, but as a necessary *instrument* to choosing one's own life plan, whether that plan places a high regard on personal autonomy or not. In chapter two, I made a case for the importance of making accessible to children the possibility of leading a life which places a high value on autonomy. The argument for this rested on a view of persons as political participants and as wayfarers who must lead their own lives and who should therefore have the capacity to make sound choices in both roles. But if we are to avoid the criticism that it is not the state's place to impose a particular view of the good life, and that touting autonomy as the only good life must lead away from other valuable alternative modes of life (such as the spiritual life), we must refine our rationale for an education for autonomy.

We will recall Arneson and Shapiro's point previously made, that "one's basic goal of living a good life generates the subsidiary goal of developing and exercising critical reflection" (1996, p. 400). This is the instrumental view of the value of autonomy, and as Arneson and Shapiro claim, the core defensible aspect of the ideal of autonomy. "The practical alternative to subjecting one's fundamental aims to critical scrutiny," they emphasize, "is to accept uncritically whatever aims socialization during one's childhood has instilled" (p. 400). Persons must ultimately choose a way of life, either autonomously or nonautonomously, but it is assumed that choosing after well-informed critical deliberation will enhance the probability that a person will choose the way of life that is better for him, whether that be the traditionalist life or a secular life (Arneson and Shapiro, pp. 401-402).

It bears emphasis that *learning how to choose autonomously does not necessarily entail that autonomy must be integral to the life one autonomously* *choose*. For example, a person might, after due autonomous reflection, decide to join a monastery, despite the fact that monastic discipline severely curtails opportunities for autonomous reflection. There is nothing incoherent about saying that a person can autonomously choose to forego a life which hails autonomy as the primary virtue, and to choose instead, to lead the religious life of faith. While the education for autonomy I defend will make the pursuit of certain ways of life more likely than others, it is the means which comes closest to allowing children to choose their own life plan while maintaining the integrity of their right to be equipped to choose *well*. It is the least invasive way of achieving a morally defensible end.

An education for autonomy escapes the charge of offending neutrality by its consistency with the principle which Will Kymlicka (1995) calls procedural neutrality. The starting point is the assumption that our beliefs about the good life are fallible. Persons have an interest in being able to reflect upon their conceptions of the good and to revise these as necessary if, after critical assessment, they are found not to be worthy of our continued allegiance. Kymlicka makes the point that people must endorse their conception of the good reflectively, but the conception of the good they reflectively endorse need not itself attach any value to autonomy. This makes room, he argues, for someone to autonomously arrive at the conclusion, for example, that rational reflection is really just an endless series of rationalizations which obscure the real sources of enjoyment and motivation, which are inaccessible to reason.

> I think that this is important because it seems to me that autonomy probably isn't an intrinsic good for some people – we all have an interest in being able to judge whether our projects and relationships are worthy of our continued allegiance, but what makes them worthy of allegiance is not necessarily that they involve the exercise of autonomy. Indeed, the idea that what makes our

> projects and relationships valuable is that they involve the exercise of autonomy seems quite implausible to me, at least for many people, and for many of the most important areas of life. What makes these projects and relationships valuable is things like accomplishment, community, pleasure, love, beauty, etc., not autonomy. Autonomy is simply needed to make sure that we have not made a mistake in our beliefs about the value of these projects/relationships (Kymlicka, 1995,).

Harry Brighouse (1998) draws a similar distinction between an autonomy-facilitating and an autonomy-promoting education. While some theorists attempt to circumvent the criticism of promoting the value of autonomy as a personal choice by suggesting that autonomy is necessarily ancillary to a robust civic education, Brighouse is concerned that this is not the cure. Gutmann, for example, argues for the inculcation of other virtues which complement autonomy in the civic sphere such as mutual respect. She insists that values be inculcated prior to encouraging rational deliberation because "children first become the kind of people who are repelled by bigotry, then see the force of reasons for their repulsion. The liberal reasons to reject bigotry are quite impotent in the absence of such sensibilities" (Gutmann, 1987, p. 43). Thus the demands of a robust civic education may catch not only rational deliberation, but may simultaneously require other perfectionist policies of value inculcation. This, he suggests, ultimately calls into question the legitimacy of the state because value inculcation by the state, particularly as concerns citizenship, calls into question whether consent of the governed is genuine or coerced. Brighouse's response is to suggest mandating autonomy-facilitating education in the curriculum independently of civic education (p. 727). The emphasis, he claims, should be on knowledge and skills over virtue (p. 733). As such, an autonomy-facilitating education invokes "not a moral value, but a true epistemological claim: that rational evaluation is more reliable than other methods for discovering the good" (p. 738). Brighouse concludes that "civic education can meet the requirements imposed by legitimacy only if tied to autonomy-facilitating education, which in turn can be justified on independent grounds" (p. 744).

I do not quarrel with Brighouse's basic thesis, but question the extent to which he implies the inculcation of values preceding rational deliberation can be skirted. Rather, I think that the ability to rationally reflect on options relies heavily upon certain dispositions that provide the motivation to question and examine in the first place. I shall elaborate on this in the next chapter. But if I am right that the development of ratiocinative skills is dependent upon the possession of certain virtues, then his concern that linking autonomy to civic virtue will jeopardize state legitimacy can be mitigated: If autonomy is linked to personal virtue in any case, the answer will not be to divorce autonomy from the realm of civic virtue, but to give an account of the *particular* virtues that are being inculcated. In other words, nullifying civic education as a reason for making available an education for autonomy does not resolve Brighouse's concern that we are inculcating values and virtues – this will happen in any event. The question will be what values and virtues.

The state, then, may legitimately exercise a paternalistic function by ensuring that children be educated for the possibility of autonomy. This will not contravene the principle of state neutrality because of its *instrumental* character which enables us to critically reflect on the good life, without unduly insinuating itself into our particular conception of the good life. Indeed, an education which emphasizes the instrumental value of autonomy is consonant with state neutrality as both are predicated upon the importance to persons of making choices concerning their own lives.

Summary

Persons are beings who conceive of values and projects and who exercise choices in the implementation of those values and projects. To this extent, human beings are autarchic. But as agents who are morally responsible for the choices they make, persons have interests in having access to the resources which will enable them to choose well. Once one embarks upon the path of culling choices and evaluating alternatives, it is difficult to see how that commitment to make good choices will not encompass the deliberation upon one's foundational values and beliefs. The ideal of autonomy flows from this commitment to make good choices. Moreover, a robust understanding of civic education will implicate autonomy. The burdens of judgment which must be borne by citizens committed to achieving reciprocity in the development of social policy carry with them the need for dispositions which lead one to examine one's own fundamental beliefs and values, and the skills to do so in a reasonable way in political discourse.

That autonomy is a good thing is not an idea shared by all. The liberal state's encouragement of each individual's pursuit of the good life will lead inevitably to the flourishing of various conceptions of the good life. To the liberal, this is a welcome and salutary outcome. Not so to the communitarian who would seek to propagate a particular vision of the good life. Liberals bristle at the presumptuousness of one individual or group of individuals being privy to 'the' formula for the good life.

Communitarians contend that the freedom which the liberal imposes upon the individual is counter-productive and serves to alienate the individual from the community rather than to act as an instrument to a better and happier life. Not only is the empirical basis of this suspect, but it is not open to us as human beings to abdicate our status as agents. We can do a better or worse job of making choices, but the choices are ubiquitous. Further, the communitarian assertion of the unintelligibility of choosing our own ends is not intuitive. In fact, we do not act as though we have no choice concerning our ends, and commonly mull them over. The critical reflection which is anathema to communitarians is an inevitable human endeavour. The question, again, is whether we do it well or poorly. Once we agree that individuals are capable of questioning, the onus falls on communitarians to justify why they should not be taught to do it well. This, I think, communitarians cannot do in any broad sense, and so it is incumbent upon us to find the proper place for rational deliberation in a theory of materials access.

That critical thinking will play an important role in the life of the autonomous person, need not however, strip him of the possibility of leading a spiritual life. Although spiritual impoverishment is frequently perceived as being the necessary adjunct of a life of rational deliberation, I think this is an error. Because transcendental matters and mundane matters operate on two different planes and rely upon unique kinds of experience, each makes room for the other. Certain cultural practices which are lumped together into the broad category of 'religion' have tended to blur the distinction. Some of these will be vulnerable to critical reflection in the autonomous life, but there is still room for the religious life. Although access to this may be curtailed somewhat, the importance of permitting access to the autonomous life by children outweighs these incursions.

Despite these shortcomings, the constant abutment of liberal principles against communitarian tenets and other anti-liberal thought has demanded that we reconsider liberal theory. These other values have served as a reminder of the importance of embeddedness in a community to achieving a good life, a life which might otherwise be awash in a liberal sea of individualism. They remind us that the life which cannot embrace spiritual matters may be an impoverished one indeed. The trick is to elucidate which principles shall guide state intervention in curricular formulation.

Because children are not capable of making momentous decisions which could seriously impact their future, it is proper for the state to make decisions on their behalf and in their own best interests. While parents exercise this authority as well, my argument in chapter six will identify state responsibility in this enterprise. In exercising its paternalistic function in educating the young, the state must navigate the restrictions imposed by the requirement of state neutrality and the anticipated parental criticism against perfectionist policies which place autonomy at the centre of a good life. The state is able to do this, I have argued, by accepting the boundaries of an instrumental, autonomy-facilitating education. Such an education allows room for the importance of autonomous skills in choosing one's life plan as well as in participating in civic life.

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[1] For a good summary of communitarian thought, see Kymlicka (1990) esp. chapter 6.
[2] On the more general issue of communitarian falsification of the past, see Derek L. Phillips, *Looking Backward: A Critical Appraisal of Communitarian Thought* (1993)

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[3] For example, the pursuit of reflective self-knowledge figures prominently in the ethical ideal endorsed by Michael Sandel in his book *Liberalism and the Limits of Justice* (1982). Cambridge: Cambridge University Press, pp. 179-183.

CHAPTER FOUR

THE INTELLECTUAL VIRTUE OF OPEN-MINDEDNESS

Open-mindedness as a Prerequisite to Autonomy and Civic Virtue

I have argued that autonomy is the cornerstone about which a theory of materials access in education must be constructed. An education for both personal autonomy and the autonomy ancillary to civic virtue derives its justification from an interpretation of what it means for the state to infuse its policies with the respect owed to persons who are moral agents. To this point, much of the discussion has been very general. Indeed, the phrase 'an education for autonomy' may hold some theoretical sway, but it is quite probably so broad as to set an impossible task for educational institutions. Practically speaking, a true education for autonomy would engage all of society in bringing about the conditions which are fertile to its development. This should perhaps be the case in a perfect world, but it is beyond the scope of this dissertation. Instead, I shall explore the connection between open-mindedness and autonomy, and elucidate the schools' role in nurturing this particular intellectual virtue.

My thesis in this chapter is that open-mindedness is key to both civic virtue and personal autonomy and as such, is an essential virtue in our lives *qua* autonomous persons and citizens. If open-mindedness is indeed a necessary condition for autonomy and civic virtue, a strong case can be made for education for open-mindedness. In practical terms, it is difficult to imagine how one might educate for open-mindedness without implicating curriculum, educational materials and pedagogical methods.

Macedo (1990) suggests that the capacity for reflective detachment from our own particular desires, projects and commitments is what allows us to comprehend and conform with justice. It helps us put a brake on our own pursuits out of respect for the equal rights of others (p. 245). David Johnston echoes that the "capacity and inclination to appraise one's own projects and values critically…is necessary for individuals to measure the value of things, either in general or specifically for themselves, to distinguish good things from bad ones and to discriminate between those alternatives that are more worthwhile and those that are less so" (1994, p. 88). The capacity for strong evaluation of this nature supports both citizenship and personal autonomy objectives.

But the requirements of both citizenship and personal autonomy are more demanding and are not satiated by a repast of critical thinking. The cognitive skills required for rational deliberation must be supported by certain dispositions and 'virtues'. Macedo suggests the ideal liberal character as one that is "actively reflective, self-critical, tolerant, reason-giving, reason-demanding, open to change and respectful of the autonomy of others, a character disposed to enjoy and participate in the vast spectacle of progress and diversity" (1990, p. 252).

I have singled out open-mindedness not because it is the most substantively important virtue on the liberal roster, but because it is a necessary, although not a sufficient, condition of autonomy. In other words, *one cannot achieve autonomous personhood without being possessed of the virtue of open-mindedness.* Autonomy supposes the ability to come to one's choices about one's projects and about one's fundamental beliefs in a deliberative way. The exercise of the practical virtue of autonomy alone capitalizes on the individual's control over making sound, reasoned judgments about one's beliefs and projects. Yet to engage this practical capacity, I contend that one must be intellectually disposed to be open-minded.

That is not to say that being open-minded will always mean that the agent is autonomous. Imagine the case of Peter, an open-minded fellow who is able to reflect on his own fundamental beliefs by holding them up to other alternatives he comes across in his readings which seem to him to have merit, and to revise them accordingly. But Peter lives in his parents' basement, and, not being possessed of sufficient moral courage to contradict them, he acquiesces to their wishes and desires and, in effect, lives under their thumb. He may be intellectually open and thoughtful, yet this does not ultimately translate into autonomy, which is a practical virtue, for he lacks other virtues which might propel him from abstract thought to autonomous action.

In order to make our own choices, both in the private and public domain, we must be open-minded, but we might be open-minded and nevertheless lack the courage, self-respect and so on to align our will with our thoughts. Open-mindedness is necessary to build the bridge to autonomy, but it will need to be coupled with other executive virtues in order to engage autonomic capacities.

Although it does not stand alone and ensure autonomous personhood, open-mindedness is a proper candidate for our concern. Its classification as an intellectual virtue brings it squarely within the purview of educational goals, and, as such, fair subject for scrutiny. More importantly, it is a starting point when, having come to the realization that a particular belief is inaccurate, we cast about for a more justifiable belief. Perhaps its greatest significance, however, is that it serves to alert us that a particular belief which we hold may be unworthy *in the first place*. One cannot be autonomous if one is unable to fathom that one's present beliefs may be wrong. Open-mindedness is crucial to the revision of *any* belief, and is the virtue which arises from the awareness of the fallibility of our judgments. Indeed, open-mindedness is a necessary condition not only to autonomy, but also to a number of other liberal virtues upon which autonomy relies. Open-mindedness is the starter pistol – without it, we don't even make it out of the blocks in the run to autonomy.

What, then, is open-mindedness? In her book *Virtues of the Mind: An Inquiry into the Nature of Virtue and the Ethical Foundations of Knowledge* (1996), Linda Trinkaus Zagzebski begins her inquiry by asserting that, at its core, a virtue is an excellence of the person (p. 84). It is also a property that we attribute to a person in a deep and important sense, and could be called a state of the soul (p. 85). Because virtue is an excellence, it is tied directly with the idea of the good, but the idea of the goodness of a virtue is ambiguous. It may mean that it *makes* a person good, or it may mean that it is good *for* its possessor (p. 89). "In the former sense of good," Trinkaus Zagzebski writes, "a virtue is *admirable*; in the latter sense, it is *desirable*" (p. 89). I shall argue firstly, that open-mindedness is a virtue, and secondly, that it is a virtue in both senses of the word.

All virtues have a motivational component, and that motive is a force acting within us to initiate and direct action. Typically, virtuous motives are forms of emotion and are action-guiding (p. 129). While all virtues are excellences, intellectual virtues (among which Trinkaus Zagzebski includes open-mindedness) are distinguished as a group by the general motivation for knowledge and reliability in attaining the aims of these motives.

> The simplest way to describe the motivational basis of the intellectual virtues is to say that they are all based in the motivation for knowledge. They are all forms of the motivation to have contact with reality, where this includes more than what is usually said by saying that people desire the truth (p. 167).

The motivation to know leads to following rules and belief-forming procedures known by the epistemic community to be truth-conducive, and the individual intellectual virtues are knowledge-conducive in their distinctive ways (p. 167).

I shall accept Trinkaus Zagzebski's structure of an intellectual virtue. For our purposes, this is relatively uncontroversial. The obstacle we shall have to overcome is whether open-mindedness is indeed a virtue, in the sense that it is either an admirable quality of a person, or a desirable quality. What then of open-mindedness? William Hare proposes that "open-mindedness involves a willingness to form and revise one's views as impartially and as objectively as possible in the light of available evidence and argument" (1985, p.3). He later expands on this idea.

> If a person sincerely wants to arrive at true beliefs, or to ensure that his present beliefs are true, then he must recognize a presumption in favour of open-mindedness. If he is not willing to adopt the practice of listening, as Mill put it, 'to all that could be said against,' he is ignoring criticisms and objections which might either show that a certain belief is false, or bring into sharper focus the truth it contains. And, then, where is his concern for truth (p. 87)?

I think Hare is correct in identifying the connection between open-mindedness and a concern for truth. Trinkaus Zagazebski elaborates on the connection between open-mindedness and truth.

> [A]n open-minded person is motivated out of delight in discovering new truths, a delight that is strong enough to outweigh the attachment to old beliefs and to lead to the investigation of previously neglected possibilities. In doing so, she is drawn by the desire to form more true beliefs, or, at least, to get closer to the truth than she was previously (p. 131).

But at the risk of needlessly pondering the obvious, we might ask why a concern for truth is a good thing, and even something which would generally be regarded as virtuous. It is implicit in both Hare's and Trinkaus Zagzebski's accounts that a commitment to truth is a good thing. That one is disposed to seek the truth does not necessarily mean that one is a virtuous person overall. It is entirely possible that one may be possessed of the virtuous disposition to seek the truth, and yet be a vicious person in other respects. This does not however, compromise the position that a concern for truth is a virtuous thing.

A concern for truth is significant in the ends it serves, and in most cases, that will be the end of discovering *how one should act*. In effect, truth-seeking serves a *moral* purpose. Implicit in truth-seeking in discovering how one should act is the assumption that one desires to make *good* choices, and hence to lead a *good* life, *whatever one might interpret that to be*. The motivation to discover the truth, then, is virtuous in that it is derivative of the desire to lead a good life. We will almost certainly find a general consensus that the concern to lead a good life is an *admirable* quality in the sense articulated by Trinkaus Zagzebski.

The connection between truth-seeking (which is the motivation which drives the virtue of open-mindedness) and the desire to lead a good life (which we concede is a virtuous project), is intimately connected with autonomy as we have conceptualized it to this point. We will recall that the case for autonomy as a liberal ideal rested upon the desirability of allowing persons the latitude to make *good* choices in their lives. Such a commitment would not only lead persons to critically assess their projects and lifeplans, but would extend to rational deliberation upon one's fundamental beliefs and values. Obviously, the autonomic project of making sound decisions in all arenas is unattainable absent a strong commitment to truth. It is the quest for truth wrapped up in the package of my life which will force me to critically appraise the facets of that life. My project to make good decisions is only as strong as my commitment to truth, which, in turn, will practically depend upon open-mindedness. That open-mindedness is nothing more than my willingness to make myself vulnerable to the truth, from whatever direction it might approach me. This commitment to the truth is prompted, in the private sphere, by the commitment to make good decisions in one's life. In the public sphere, however, it is the demands of the burdens of judgment which will shape that commitment. Open-mindedness is what allows us to open our eyes and to look out of our own windows to other worlds. Without open-mindedness, our windows are shuttered, and without other vistas, there is no raw material for empathy, tolerance, or critical thinking, and certainly no impetus to make any travel plans for ourselves. Why quit the comforts of home when we have never glimpsed the possibilities in other beliefs, values and projects?

Yet open-mindedness has been roundly criticized, as both a naïve and unattractive educational objective – naïve because it is ingenuous to think that people are not proprietarily attached to their opinions, and unattractive because often we *want* people to believe certain things and to refrain from questioning them. In the following section, I will address the more salient objections. Although I have not entirely fleshed out what I mean by open-mindedness, in dealing with the objections, I am optimistic that a more ample understanding of open-mindedness will emerge.

Criticisms of Open-mindedness

There are those who would argue that one might still be a fervent seeker or adherent to truth even though one is not open-minded in the sense advocated. A devout Christian, for example, might claim to be as, or even more, ardently committed to the truth which has been revealed to him, as any open-minded Socratic liberal might be. His reluctance to test other waters, from this perspective, could be seen not as a rejection of the truth, but rather as a reflection of his firm belief in having already come upon the truth. I have no doubt that many people are confident of their commitment to truth despite the rejection of open-mindedness. But I believe their objections to be ill-founded.

If ever we must admit that we have misjudged or erred, been led astray by irrelevancies or failed to consider pertinent information, or generally succumbed to the foibles of human inadequacy in our decision-making, then we must also admit the vulnerability of our held beliefs. It is unreasonable to assume that, given our experienced fallibility, there will never be a need in the future to exfoliate held, but false, opinions.

To propose to send children out into the world with the assumption in hand that all that they know and believe is true, is a profound and dangerous disservice.

The need for open-mindedness is premised upon the very simple proposition that no one is perfect. Even if we accept the premise that God is infallible and that His truth is incontrovertible, our ability to discern God's will and revelation of truth is decidedly inadequate. Furthermore, even if everything we already know were true, we must still get around the rather sticky problem that we continue to learn throughout our lives. When we are left on our own (as inevitably we must be) to exercise our own independent judgment, surely we cannot expect to plug a particular gap in our thinking with the next opinion that happens along. Open-mindedness permits us to bide our time until we are satisfied, by the evidence, of the truth of a proposition. Open-mindedness, then, is an essential truth-conducive disposition. On its own, it cannot ensure that the beliefs we hold are true, for many other skills are required to approach this ideal. Yet if we are not open-minded, if we are not open to the possibility that our held beliefs are false and that others may be right, we will never test our own held opinions and those of others. Because open-mindedness is an essential truth-conducive disposition without which we cannot have sound grounds to claim that our beliefs are solid, open-mindedness is a disposition which is not only *admirable* (which we have already admitted), but also good in the sense that it is *desirable* for its possessor, which is the second way in which a quality might be considered a virtue. Open-mindedness is a desirable quality because, practically speaking, it allows one to be effective in seeking the truth.

The link between open-mindedness and autonomy, and between autonomy and the pursuit of the good life is thus forged. Autonomy is instrumentally valuable to the good life as it gives us the practical means to assess choices and to make good decisions in our lives, including choices as to our fundamental commitments. As a necessary condition of autonomy, the virtue of open-mindedness enables us to undertake this autonomic project with a greater measure of success, since success will depend in large part upon our ability to be open to and to recognize truth.

A second criticism of open-mindedness is the damning indictment that open-mindedness is essentially a form of nihilism where nothing is valued. This is so, it is argued, because open-mindedness implies doubt about one's opinion and doubting something which one purports to believe, necessarily weakens the strength of one's convictions. In short, one deceives oneself in thinking that one might be open-minded and committed to one's opinion at the same time – the two are mutually exclusive. Peter Gardner's (1993) concern is that teaching children to be open-minded suggests one of two things: children are either not encouraged to hold beliefs at all, or they are not encouraged to hold firm beliefs. Peter Unger argues that being open-minded about something precludes ever being certain of one's opinion (1975, pp. 115-6). J.E. Colbeck argues that "to be committed to impartiality, to criticism, and to 'truth for its own sake' is to be committed to not being committed" (1976, p. 24). If this were so, it would be a trenchant criticism of open-mindedness, for the very project of autonomy and the responsibilities of citizenship *require* that we hold beliefs, even strong ones.

William Hare and T.H. McLaughlin (1994) point out that, on Gardner's view, to hold a belief *is* to have closed one's mind. But, they argue, we need to distinguish how beliefs are held – whether as someone who is open to entertaining questions about them or dogmatically (p. 240). Part of the problem may be that the term 'open-mindedness' is somewhat ambiguous. Gardner, Unger and Colbeck all seem to fall into the trap of equating open-mindedness with tepid commitment to one's beliefs at best. The confusion, it seems to me, arises from a failure to conceptually understand the role of open-mindedness in belief formation. Gardner sees the process as a timeline with absence of opinion or open-mindedness at one extreme and on the other, the presence of a belief or opinion which has evolved out of open-mindedness but which has left it behind. Moreover, he seems to tacitly subscribe to the view that this scale corresponds with another scale which measures the tenacity of one's belief: we have little commitment when we are open-minded, but when we form an opinion farther along the axis, we concomitantly hold to the belief with varying degrees of allegiance, depending on how far from open-mindedness we have traveled.

I think that this model is flawed. Hare suggests that these detractors confuse not being committed in advance to not being committed at all. To be committed to open-mindedness, he claims, is a commitment to have one's beliefs rationally grounded, not to have no beliefs at all. This suggests a different conceptual theory. The basic timeline is one with an *absence of belief* on one extreme and the *presence of belief* on the other, but this does not correspond to an open-minded to closed-minded axis. Rather, *the entire belief formation scale is overlaid by one's relatively static open-minded or closed-minded disposition.* It is this latter disposition which determines *how* one's beliefs are held. Gardner's explanation does not account for the differences in how people come to hold opinions. It is undiscriminating in terms of whether belief is acquired dogmatically or by way of critical assessment by failing to recognize their distinctive ontogeneses.

That one has arrived at one's opinions in an open-minded manner means two things. Firstly, it means that one has been impartial in assigning the weight of reasons in arriving at that opinion. Secondly, it means that one continues to feel the pressure of countervailing reasons and will give them their due. But neither of these things leads to the conclusion that Gardner suggests – that being open-minded precludes one from being committed to one's beliefs. Nothing could be further from the case. Because he considers the weight of reasons, the open-minded person will hold beliefs as firmly as is warranted by the preponderance of evidence in support of those beliefs. This makes room for both weakly and strongly held beliefs, proportionate to the governing reasons. For the open-minded person, the strength of conviction simply mirrors the strength of reasons as opposed to other irrelevant considerations.

Another criticism has been leveled at open-mindedness because of its perceived detachment. Mary Warnock (1975) warns that the detachment and neutrality demanded of the critical skills risks making an orphan of personal feelings. Her concern is well-placed. If it could be said that the impartiality and detachment demanded of the open-minded individual in assessing evidence were to strip persons of passion, sympathy, revulsion and myriad other emotions, one would be hard-pressed to make a case for the virtue of open-mindedness. Arguably, it is our human emotions which give value to our lives. The irony is that unchecked feelings, which can lead us astray in our rational deliberations, are essential to developing dispositions necessary for personal autonomy and the burdens of judgment of citizenship. Do we delude ourselves by hoping to achieve a balance because the development of one sabotages the development of the other?

This is a complicated empirical question, and one that is not easily answered. Yet there are clues that would seem to suggest that, far from being antithetical, reason and feelings are complementary, at least insofar as they relate to open-mindedness. I contend that we have been made to choose (needlessly, I would argue) between reason and feelings. The dichotomy is perpetuated by a paradigm which perceives them as being mutually exclusive, and an education system which, buying into the paradigm, has bounced from one objective to the other without conceptualizing their proper places and roles in education.

It is important to note that neither intelligence nor pure rationality are synonymous with open-mindedness. The ability to engage in ratiocination does not meet our understanding of what it means to be open-minded. The latter is suggestive of an *attitude* or disposition which is not entailed by ratiocinative skills. We will recall the point raised by Trinkaus Zagzebski that the motivational component of any virtue is grounded in *emotion*.

> Motives are important for our study of virtue because they typically are forms of emotion and are action-guiding. Both features have been identified by traditional writers on the virtues as important components of virtue. I suggest that the concept of a motive is the place at which we can see the true connection between virtues and emotions or feelings. A motive is a force acting within us to initiate and direct action (1996, p. 129).

The desire to seek truth for the purpose of guiding both private and public action is not purely intellectual. In fact, as Trinkaus Zagzebski suggests, without the emotional component of the virtue, open-mindedness lacks its motivational force. But emotion plays an even greater role than simply motivational. One cannot be open-minded *at all* (let alone be motivated by open-mindedness), without having engaged the emotions.

Open-mindedness, I suggest, is built upon the recognition of our fallibility in discovering truth. We would be mistaken to categorize this as either a rational or an emotional response. This moment of epiphany which replays itself again and again in both our conscious and unconscious lives, is *dualistic* in nature – it is an emotional understanding of something that is perceived intellectually. That is not to say that open-mindedness requires any great intellectual prowess. Just as autarchy is the normal state of personhood and is attainable by nearly everyone, so too is the discovery of human fallibility.

This dualistic event[1] translates into *emotions* – humility and a concern for truth – which are the impetus for rational deliberation. These play as important a role in personal autonomy as they do in civic virtue. Particularly with respect to the latter, it is humility and the concern for truth which inspire feelings of tolerance, respect for others, and so on.

Yet the role of the ability to think critically is by no means negligible, even at the inception of open-mindedness. The *opportunity* to be open-minded remains latent unless it is stirred by some sort of need for its existence. As with most human potentialities, these abilities are superfluous unless conditions create the need for their manifestation. In the lives of adults, these conditions may be ubiquitous, particularly inasmuch as social interaction demands *some* kind of response. But for children, the development of the abilities upon which open-mindedness is founded is largely moderated by the expectations we have of children, the kinds of situations in which we place them, and the level of responsibility with which we burden them. Perhaps most importantly, it is moderated by the child's confidence in his own ability to be able to respond variously to situations. If a child has no skill in rational deliberation, he will likely not perceive that as a course which is open to him. The skills necessary to rational deliberation point up an available avenue down which the child might travel, humility and a concern for truth in hand.

The emotions of humility and a concern for truth which inspire feelings of tolerance, respect for others, and so on, are engaged dialectically with deliberative skills which culminate in the development of open-mindedness. This not only equips us to question our own fundamental beliefs and values, but enables us to transcend egocentrism and to view others' projects and beliefs as worthy. Interestingly, the term 'open-mindedness' may itself be misleading as it would seem to restrict this complex interplay to a cognitive function. If we are to be faithful to that which comprises open-mindedness, we might more appropriately coin a term which captures as well the essence of 'open-heartedness.' If we are to educate for the virtue of open-mindedness, then, we will need to address the education of the emotions of humility, the desire to know, a concern for truth, and the corresponding skills in critical thinking.

Properly understood, open-mindedness escapes Warnock's criticism, but another criticism voiced by Francis Dunlop (1979) takes us one step further. Warnock's concern was that an emphasis on rational deliberation dangerously neglects the role of feelings, and this was put to rest by exploring the necessity of both rational deliberation *and* the emotions in open-mindedness. Dunlop's concern is that an emphasis on rational deliberation does not guarantee the development of moral persons.

> [U]neducated people with more or less 'butterfly' minds who frequently contradict themselves and rely on suggestion and context rather than logical precision may yet be scrupulously moral people; and many eminent writers and thinkers, who, in general respected the laws of thought, have been grossly immoral (p. 173).

It seems to me that this argument is persuasive only if it can be shown that the development of the ratiocinative skills and emotions essential to the virtue of open-mindedness actually *hinders* moral development. If the two are unrelated, Dunlop's observation may be an interesting one, but it is irrelevant to our discussion of whether open-mindedness ought to be encouraged or not. Can the position that open-mindedness hinders moral development be maintained?

It would be a trenchant criticism of open-mindedness that its path leads away from the moral life because it is incompatible with other moral virtues. But I think that this position is untenable. In the first place, one must be cautious of confusing 'moral results' with truly virtuous moral behaviour. A person may act in a particular way which has the appearance of moral action, while no authentic moral choice is being made. In other words, if the agent is not conscious of a choice to act one way as opposed to another, morally inferior way, then one would question whether he has been confronted by a moral dilemma at all. Implicit to moral action is the assumption that the agent may have acted otherwise. On this view, much of what passes as morally praiseworthy action, may in fact may be nothing more than fortuitous moral result, as it lacks an essential quality of intentionality.

Secondly, Dunlop's criticism that some eminent thinkers have been immoral by any other standard may simply point up the obvious conclusion that one virtue may operate quite independently of other virtues. For example, the fact that I am courageous in the face of my own hardship does not mean that I will be altruistic and assist others in alleviating their hardships – there is no necessary connection between the moral virtue of courage and the moral virtue of generosity. Likewise, one may possess the intellectual virtue of open-mindedness and yet be selfish. But this is not incriminating unless, as was previously stated, the virtue of open-mindedness in some way stultifies the growth of other virtuous dispositions.

Trinkaus Zagzebski concedes that it is possible that a virtue may not always appear to bolster an agent's overall goodness. She cites two examples:

> On the face of it the courage of a Nazi soldier makes him worse overall than if he were cowardly. Gregory Trianosky invents a compassionate but biased judge whose compassion for the victims of crime makes him even more unfair than he would have been without the compassion and, presumably, worse overall because of it. The idea in each case is that all other things being equal, the addition of courage to the Nazi's character and the addition of compassion to the judge's character result in each of them becoming morally worse (1996, pp. 91-2).

It is conceivable that, despite its tendency to truth-conduciveness, the same kind of reversal could exhibit itself in the case of open-mindedness. One could imagine cases where an undeveloped sense of confidence in one's opinions or insufficient courage to hold unpopular beliefs might lead the open-minded person to abandon true beliefs more quickly than a closed-minded person.

Nevertheless, I would argue that the possibility of arriving at fewer true beliefs in these few cases is not sufficient to bring into doubt that open-mindedness is indeed a virtue. Trinkaus Zagzebski makes two convincing arguments to resolve this issue. Firstly, she states that a virtue is worth having even in those cases in which it makes a person worse overall.

> The reason for this, in brief, is that without it a person would have more moral work to do to attain a high level of moral worth. Although the compassionate but unfair judge may be worse overall than he would be if he were less compassionate, his compassion is a good thing in itself and it is worth having even *for him* because with it he only has to overcome unfairness; without it, he would have to overcome unfairness and lack of compassion (pp. 93-94).

She goes on further to say:

> Similarly, as the unfair judge becomes compassionate, his compassion may for a time make him worse because more unfair. But he is actually closer to being a virtuous person with compassion, *and he cannot be a virtuous person without compassion* (emphasis added) (p. 94).

A similar case can be made for open-mindedness. *Even* in cases where being open-minded will make someone worse overall, its general importance in truth-conduciveness cannot be cast aside, and without it, one has much further to go to achieve epistemic excellence. Indeed, one cannot be an intellectually virtuous person without open-mindedness. In the end result, Dunlop's criticism must fail as a reason for not educating for the virtue of open-mindedness.

Indoctrination and Open-mindedness

To be sure, an open-minded disposition will not guarantee that our conclusions will be correct. We might be as diligent and open-minded as we are capable of being and still arrive at false conclusions. J.S. Brubacher restates the 'scholastic realist' position.

> The immutability of truth and goodness lays yet a further imperative upon the teacher. If he is imparting what is unmistakable and eternal truth or what are well-known essentials, it will be legitimate for him to indoctrinate. He will even be inclined to this procedure where there is uncertainty as to the final form of truth or goodness, for then his duty will be to pass on the most approved to date. To let a youth arrive at his own conclusions independently may result in an extravagant waste of time, to say nothing of his running the

> risk of failing to put in at the proper port at the end. If this method of instruction seems to disregard minority or contrary opinions, suffice it to say that the truth, if it is the truth, must be intolerant of error (1969, pp. 356-7).

One might be persuaded that, in specific instances, the acquisition of truth ought to take precedence over open-mindedness.

In principle, I reject the scholastic realist position. This is not to dismiss the importance of truth, but to affirm the role of open-mindedness in truth-seeking. Particularly 'where there is uncertainty as to the final form of truth or goodness,' it is a mystery how we, either individually or as a species, are to travel beyond inveterate guesses at the truth except by pursuing the course laid out by open-mindedness. If children are not endowed with the tools to bridge conjecture, they become mired in the unhappy limbo of quasi-certainty about uncertainties. It is unclear how this situation does justice to truth. But we cannot ignore the very real problem that we encounter if almost everything that is taught a child is taught as theoretical or speculative, awaiting the rise to grace from the child's own critical assessment. Surely, one might argue, there are circumstances where it will be wrong – even dangerous – *not* to educate in a fashion which presumes the truth of certain propositions. The real difficulty is the place of open-mindedness where we, as a society, can quite confidently say that we have come upon the truth and are convinced of the importance of its being perceived by the child as true. Are we to let children flounder about while we stay hushed in the shadows, safely aboard our own lifeboat? The question is a disconcerting one, and the response much more complicated than a categorical yes or no. In this section, I shall explore the complexities of indoctrination in the context of open-mindedness.

To begin, Hare points out that there must be a *presumption* in favour of open-mindedness. As is the nature of presumptions, this is defeasible, provided a case can be made for a contrary view in a particular set of circumstances (1994, p. 4).

> Such a presumption, of course, does not mean that open-mindedness is *always* desirable. For example, the likelihood of making the right decision in certain cases may be so remote if we try to evaluate all the circumstances, that we may decide to stick with a well-established general principle…the onus may well fall on the person who wishes to defend closed-mindedness on a given occasion to make out his case, but it is entirely possible that this could be done. If the presumption is not defeated, however, a concern for truth will require serious consideration of evidence and argument in the formation or revision of one's views (p. 4)

Hare's qualification is useful, but the criteria according to which we might recognize those countervailing reasons that might count as a justification to set aside open-mindedness are still vague. Sometimes, it *may* be more important to put in at the right port, but by what moral cartography do we discern what the right port *is*, and in what cases do we decide there is an overriding importance such that we will not educate for open-mindedness? This must be defined not only by our perceptions of what is true or false, but also by our understanding of personhood. Indoctrination, in common parlance, is a pejorative term. A discussion of indoctrination is germane to this inquiry in that it is often viewed as a form of pedagogy repugnant to open-mindedness. It will be appropriate to consider indoctrination in this context, and in the context of the importance of putting in at proper ports.

No single view of indoctrination draws consensus. Yet this will be important to determining whether it is an evil to be avoided or not. If it is always an evil, then the importance of open-mindedness will suggest that it is never commendable or even permissible to indoctrinate; if it is only an evil sometimes, then in certain circumscribed circumstances, it may not only be permissible, but laudable to indoctrinate. I.A. Snook posits that a "person indoctrinates P (proposition or set of propositions) if he teaches with the intention that the pupil or pupils believe P regardless of the evidence" (1972, p. 154). He elaborates the definition of 'intends' to cases where the teacher 1) intends (desires) to indoctrinate; 2) intends (desires) that his pupils hold beliefs regardless of evidence; or 3) foresees that as a result of his teaching, such a result is likely or inevitable.

This position poses a problem. It identifies as the locus of the process, the teacher as opposed to the student. The problem with tying indoctrination to intentions is that it does not capture the sense that it is the *result* which is objectionable, and because of this, the impugned teaching is morally abhorrent. Nevertheless, the teacher's action is secondary to and dependent upon, the result. Snook's attempt to assign moral responsibility is useful, though misguided. It surely flows from a desire to impede a practice which produces objectionable results. But because there is no one-to-one correlation between how a teacher teaches and the results that are produced in students, too much falls through the cracks of his criteria.

If we are to accept Snook's argument, what is objectionable about indoctrination is that the teacher *intends* that pupils hold beliefs in a certain way, or *foresees* that her teaching might lead students to hold beliefs in a certain way. Because the emphasis is on teacher intention, there is no room for the possibility that the result was *foreseeable* or *reasonably foreseeable* , or that the result *ought to have been foreseen* by the teacher, which may be similarly blameworthy, but to a lesser degree. The focus upon assignment of culpability distracts us from teasing out what is truly objectionable about indoctrination. If we are to adopt Snook's criteria, we will overlook responsibility of less reprehensible, but still blameworthy behaviour. More importantly, whatever interests the child might have are shielded only by standing in the lee of the teacher. The student will have no independent protection and will be vulnerable to the elements should the wind shift direction and assail him from another side.

David Cooper recognizes Snook's quandary and attempts to refine the definition. He suggests that Snook does not deal with the case of the *sincere* indoctrinator which comprises the vast majority of cases; the *insincere* indoctrinator with whom he deals is the far rarer bird. Instead, Cooper posits the following test:

> Given, then, that we cannot employ intentions to identify responsibility and hence indoctrination, some other criterion of identification must be available. Surely method or manner would be plausible candidates. It seems impossible, that is, to recognize indoctrination except in terms of the methods or manner of teaching, for it seems impossible, except in these terms, to find reasons for holding a teacher morally responsible for his students emerging with fixed beliefs (1973, p. 52).

And further:

> Indoctrination will be identified as such by the tendency of the activities involved to produce certain effects, e.g. to result in non-evidentially held beliefs (p. 53).

Cooper's emphasis on method is more comprehensive as it permits for a more flexible standard of responsibility, but it still fails to acknowledge that it is the *effect* upon the student which is central to indoctrination. I believe that he errs because he too has obfuscated the concept of indoctrination with the necessity for apportioning moral blameworthiness.

John Kleinig is most perspicuous in identifying the germ of indoctrination. He states:

> [I]n so far as content, methods, and intentions are related to indoctrination, and I have not wanted to deny that relation, it is because of a causal connection. The communication of certain kinds of beliefs, attitudes, etc., the use of certain methods of communication and the possession of certain intentions all render it more likely – perhaps very likely – that indoctrination will occur. But they themselves are not constitutive of indoctrination…indoctrination is teaching in which the beliefs, values, etc. taught are no longer open to full rational assessment (1982, p. 62).

Kleinig has thus liberated the concept of indoctrination by obviating the necessity of defining it exclusively in terms of moral responsibility. This makes room for the possibility of systemic, as opposed to teacher-occasioned indoctrination. It also allows for non-blameworthy instances of indoctrination where, despite a teacher's best efforts, a student's temperament or disposition is such that he is susceptible to holding beliefs in this fashion. The advantages of this view are twofold. Firstly, it identifies the student and his interests as being the primary focus. This permits for greater protection of her needs. Secondly, it allows for a more general form of moral responsibility, attaching it to various possible sources of the indoctrination.

Kleinig states:

> Centrally, indoctrination constitutes one form of assault on the person. If we see people as responsible agents – as beings who can be held responsible for what they believe and do – in other words, as autonomous, productive beings, then indoctrination constitutes a partial frustration of their realization. It involves a violation of people's personalities such that beliefs, attitudes, values, etc. which they hold are not available for appraisal. To the extent that this is so, they lack independence and control over their lives (1982, p. 65).

Kleinig identifies, correctly, in my view, autonomy as being of fundamental importance in understanding what is objectionable about indoctrination. The emphasis on culpability, inherent to both Cooper's and Snook's theories, is of peripheral concern from this perspective. While presumably incorporating some kind of concern for autonomy, Snook and Cooper's failure to make this explicit in their models marginalizes this central value and forces them to rely upon blunt instruments to excise offensive practices. As I have already discussed, this will often lead us to remove too little. But interestingly, it might also mislead us to remove *too much*.

By identifying autonomy as the yardstick by which to measure the morally repugnant aspect of indoctrination, Kleinig's model ensures that we can target factors other than teachers' intentions which might be objectionable. But it also leaves open the door, however marginally, that some inculcated belief *which is not destructive of autonomy* need not be excised. Kleinig does not address the matter directly, but one might conclude from the centrality of autonomy in defining indoctrination, that inculcated belief which *fosters* autonomy might be exempted.

This might seem to be a paradoxical thing to say. I have gone to great lengths to make a case for open-mindedness, and yet I now defend that some indoctrinary pedagogical practices may be commendable. It calls into question the contemporary view that all indoctrination is objectionable which has as its result that beliefs, values and attitudes not be available for general appraisal. Yet if we accept that personal autonomy and the autonomy which is derivative of the burdens of judgment define what is objectionable about indoctrination, then we must make room for this possibility. Hare's suggestion that open-mindedness is presumptive may be rebutted by a sufficiently powerful argument that belief inculcation and the nurturing of certain dispositions are not only beneficial to, but necessary for autonomous action.

It is these same criteria which assist us in glimpsing what the 'right port' might be. Whereas factions might grapple to claim it for their own and to populate it with their own partisan views of what comprises the good, I suggest that the 'right port' when one speaks of indoctrinary pedagogical practices ought properly to be understood as those beliefs, attitudes and dispositions which are conducive to the flourishing of autonomy and civic virtue. In the next chapter, I will return to this idea of justifiable belief inculcation as necessary to the development of the virtue of open-mindedness, particularly during the early, formative years. Let us bear this in mind as we turn to flesh out what it will mean to educate for open-mindedness.

Summary

Open-mindedness is an intellectual virtue motivated by emotions which include the desire to know. It is further associated with humility, as it is this which allows us not only to perceive value in the beliefs and opinions of others, but to be open to that possibility in the first place. It is an excellence which makes a person good, and as such is *admirable*. This is so because to *desire* to lead a good life is a virtuous thing intrinsically, and it is this which informs the fundamental motivation which gives substance to a concern for truth. Likewise, it is an excellence which is good *for* its possessor and is therefore *desirable* as well. Its instrumental value lies in its importance in truth-seeking, and its conduciveness to achieving that end. If one is sincerely concerned with discovering truth, one must also be willing to seek it wherever that quest might lead. Open-mindedness allows us to open our eyes and entertain the possibility that truth may reside in apartments other than our own beliefs.

The intellectual virtue of open-mindedness is essential to both personal autonomy and civic virtue as it pre-exists the development of other liberal virtues. It is a snowball that picks up other virtues as it gains momentum. Without it, it will be difficult, and at times impossible, to develop other liberal virtues which rely logically upon an open-minded disposition. That open-mindedness is crucial to the flourishing of autonomous choice of moral persons and citizens is a powerful justification for educating for those things constitutive of open-mindedness. As such, it is properly understood as a vital interest of persons.

While the virtue of open-mindedness as an educational ideal has been challenged, these criticisms have not been persuasive. Firstly, while it is conceded that open-mindedness is not always truth-conducive and does not always guarantee being right, it is the most *reliable* way of achieving truth when paired with other truth-conducive skills and dispositions. Without it, correct beliefs are true more by good luck than good management. The second criticism that open-mindedness is merely a form of nihilism is similarly ill-founded. It is perfectly consistent that an open-minded person hold opinions with varying degrees of strength depending upon the weight of evidence, and is even consistent with the passionate holding of particular views. Thirdly, open-mindedness escapes the criticism that the detachment required of open-mindedness risks making an orphan of personal feelings. Indeed, as we have seen, open-mindedness *relies* upon personal feelings to motivate its action. Finally, while open-mindedness does not *make* a moral person, it does not lead away from virtue either. The fact that open-mindedness may co-exist with other qualities of character which are vicious simply supports the conclusion that at least some virtues exist independently of others. Even when open-mindedness leads one to more questionable results than closed-mindedness might, a person is nevertheless *closer* to being virtuous with the virtue of open-mindedness than one would be would be without it, and one cannot be a completely virtuous person without it.

For these reasons, there is a presumption in favour of open-mindedness, but, as Hare argues, this presumption may be defeated in a particular case. Sometimes it may be more important to "put in at the right port" than to wander about in search of truth. The key to determining when it will be appropriate to be more proactive in nurturing particular beliefs is in identifying what it is about indoctrination that is objectionable. Kleinig provides the most satisfactory answer when he argues that autonomy is of fundamental importance in understanding what is objectionable about indoctrination: Indoctrination is bad because it is an affront to our understanding of persons as choosing, self-directing individuals. This makes room for the possibility that some belief inculcation which is not destructive of autonomy, and which may even be crucial to fostering open-mindedness in the long term, may be laudable. I shall return to this idea presently.

Education serves many purposes, and it would be ingenuous to claim that an education for open-mindedness is exhaustive of educational objectives. Yet encouraging open-mindedness in children must be one of its most important goals, as it is crucial to personal autonomy and civic virtue. Furthermore, a philosophical inclination to foster open-mindedness will be the most important factor in laying down an approach to curricular selection. Other educational aims will influence the *content* of curriculum significantly, but the policy to educate for open-mindedness will determine generally whether curriculum will be closed or open, whether pedagogical methods will be authoritarian or democratic, whether access to ideas will be restrictive or broad. It is to the practical ramifications of an education for open-mindedness to which I now turn.

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[1] I say 'event' for lack of a better word. In fact, the recognition of fallibility occurs as often in numerous minute and indiscreet events as in one cataclysmic incident. For our purposes, however, this is beside the point.

CHAPTER 5

EDUCATING FOR OPEN-MINDEDNESS

Developmental Theory

How should we educate for open-mindedness? Recall that the virtue of open-mindedness may be broken down into constitutive dispositions and abilities, and each of these will entail distinct educational commitments. But however we undertake to educate for open-mindedness, it would seem clear that we cannot ignore that cognitive and moral developmental models will have a significant bearing. Piaget, for example, theorized that cognitive development unfolded by discrete, consecutive steps, each building on the previous and moving the child from a largely irrational being to one eventually capable of carrying out complex formal reasoning operations. Similarly, Kohlberg postulated a theory of moral development analogous to Piaget's which described stages from the pre-moral to that demonstrating highly abstract and universal principles governing one's own and others' behaviour.

We need not delve into these specific theories in any great depth. It will suffice to say that these theories are beset by their own controversies, but that we may nevertheless extract some important, if general, guidance from them. It is beyond the scope of this dissertation to explore developmental theory at length. Some general observations concerning development, however, will be necessary to give some spine to a theory of materials selection. At the risk of banality, I shall try to restrict these to relatively non-controversial observations.

One theory in particular which begs comment as it is perhaps one of the most influential theories of human development, is captured in Jean Jacques Rousseau's growth metaphor.

> Let us lay it down as an incontrovertible rule that the first impulses of nature are always right; there is no original sin in the human heart, the how and why of the entrance of every vice can be traced (Rousseau, 1986, p. 56).

As a result, his caution to "not save time, but lose it" translated into an education by abstinence (p. 57).

> [T]he education of the earliest years should be merely negative. It consists, not in teaching virtue, or truth, but in preserving the heart from vice and from the spirit of error (p. 57).

Rousseau's thought is exemplified in the laissez-faire progressive education philosophy which grew out of the sixties. The idea that children are naturally good and that the best we can do for them is to permit the unfurling of their natures gained momentum. The bold experiment at Summerhill was an attempt to incorporate these principles.

> [W]e set out to make a school in which we could allow children freedom to be themselves. In order to do this, we had to renounce all discipline, all direction, all suggestion, all moral training, all religious instruction…All it required was what we had – a belief in the child as a good, not an evil, being.
>
> My view is that a child is innately wise and realistic. If left to himself without adult supervision of any kind, he will develop as far as he is capable of developing (Neill, 1960, p. 4).

If A.S. Neill's view of human development is correct, the entire process of education as it has evolved is called into question. The yardstick of a good education system will be its amenability to be shaped by students' natural inclinations. Their freedom to access those ideas in which they are interested, to forego those which are intellectually taxing, to shelve those which do not capture their immediate interest, will be paramount. The attempt to construct a theory of materials access as it has unfolded to this point would be moot. Materials and ideas would not be something that society would mete out to students in any kind of systematic way. Rather, children would browse the available options and make their own selections. Even the notion of compulsory education would become anachronistic.

All of this is defensible if Neill's basic premise is accurate – that left to their own devices, children will develop to the ceiling of their own potential. In my view, this thesis claims too much. Neill's yardstick by which the education is judged is not calibrated to measure the development of autonomy, but rather the development of authenticity. As Kenneth Strike observes, proponents of this kind of education are not interested in creating people who are independent and who are responsible for their own conduct.

> Autonomy is very much an achievement. It requires understanding and self-control. It is a quality that infants, who respond almost mechanically to internal and external stimuli, lack. Authenticity, by contrast, is a matter of choosing or acting consistently with one's nature, of being one's self, not being phony. It requires the ability to identify and act on one's genuine tastes and preferences.
>
> Autonomy and authenticity are thus distinct. Both are worthwhile. Autonomy, however, is a fundamental value. It is a requirement of being a moral agent and being responsible for one's self and one's conduct. Authenticity is not similarly fundamental (1982, p. 56).

Allowing authenticity to flourish untended is anathema to the development of autonomy. Laura Purdy (1992) reviews the literature to determine how children, raised at different ends of the permissive/authoritarian spectrum develop in terms of their personal characters and attributes. She considers the cardinal Freudian principle that repression is the major cause of neurosis. The expected panacea was a freer, more lenient, indulgent and permissive upbringing, with a minimum of interference on the part of educators and parents. But the anticipated results were elusive. "In both the periods of experimentation we have looked at," she writes, "it seems clear that conditions of very great freedom for children failed to lead to the good consequences the growth metaphor would predict. This result suggests that the metaphor itself is mistaken…In my review of the literature, I found no accounts that support the liberationist position, and it seems to me highly improbable that they exist" (1992, pp. 98-9).

Eleanor Maccoby (1980) found that children raised in permissive families

> …were less able to wait for things they wanted and demanded immediate gratification and gave little attention to consequences. Their expression of emotions was often explosive and unregulated. They had poor ability to maintain attention and commitment to tasks they undertook. Their behaviour had a superficial, unorganized, flitting quality, and they changed their minds and their enthusiasms frequently (p. 135)

Purdy cites Wesley Becker's (1964) review of a 1939 study in which he concluded that children of submissive (permissive) parents were more disobedient, more irresponsible, disorderly in the classroom, lacking in sustained attention, lacking in regular work habits and more forward and expressive. Purdy observes that children reared according to these principles were neither creative nor repressed, but rather, demonstrated infantile behaviour. "They showed relatively little interest in the world about them, preferring to daydream, were not toilet trained, and displayed volatile emotional activity" (1992, p. 95). The research showed that the children could not concentrate. What was even more damaging to the objective of civic virtue in particular is that they seemed egocentric and group demands affected them little. They were extremely intolerant of even the most mundane demands of adults such as manners and basic hygiene, which became sources of conflict (p. 95). Hoffer further notes that the children "showed an unexpected degree of irritability, a tendency to obsession, and depressions" (pp. 302-3).

Rousseau and those who have come after him are not to be faulted for observing that society is a corruptive force, for indeed, it can be. Their error is in assuming that, if society corrupts, then man is essentially good in his natural state and in that state alone. To suggest instead, that children do not, of their own accord blossom into the pinnacle of virtue in humanity is far from being a cause for despair. It is, rather, a more optimistic thesis – that persons are not doomed to maintenance of the status quo or retrogression at every environmental encounter. Instead, it celebrates those capacities which make us human, which allow us to learn, to choose, to grow, to seek meaning, and to formulate our own projects. It celebrates the power of human diversity and allows for the possibility not only of individual, but societal progress. It is this which is the essence of the dignity of human life.

It is clear that the liberationist position will be devastating to the development of autonomy and civic virtue. With respect to the latter, we might well worry, with Strike, that "a society that promotes authenticity may have cause to lament the reluctance with which its members give one another justice" (1982, p. 156). The egocentrism of authenticity is not conducive to the development of humility and the concern for truth crucial to open-mindedness. It is ill-suited to the further necessity of dispassionate objectivity with which competing claims must be assessed when engaged in rational deliberation. It would be unwise, then, to formulate curricular programming around a developmental model which grants unbridled freedom to children to choose their own materials. Such a policy would surely fail to encourage the open-mindedness necessary to autonomy and to the appreciation of the civic burdens of judgment. Paternalism is not only appropriate, but essential to the development of these capacities. As Purdy suggests, "it would seem plausible to explore middle roads between total freedom and total control" (1992, p. 97).

Having found this theory of child development to be inadequate for our task in constructing a theory of materials access, we find a remarkable thread of consistency between those remaining. Arlene Skolnick reviews a number of conceptions of child development. She cites Baldwin's survey of the major theories of child development and concludes

> …that despite their differences, there is a consensus among theories that there are two main types of psychological functioning. The first is primitive, direct, impulsive and non-cognitive – or primary-process; the second is more controlled, thoughtful, and logical – or secondary process. One is essentially child-like; the other, adult-like (1975, p. 68).

She also refers to White, whose learning experiments revealed a marked change in children's performance between the ages of five to seven years. From his survey of the research literature, he identifies 21 behaviour changes that occur during this period. Notably, the child becomes more abstract and symbolic; he responds to stimuli more in terms of language than in terms of physical properties, and his stronger grasp of the past and future enable him to plan out behaviour in advance (p. 68). Whereas prior to this time period, maturation plays a crucial role in developmental change, Skolnick suggests that changes after this time are not as momentous and that "learning and culture become the major forces influencing psychological development" (p. 69). She concludes:

> besides their social effects in creating a separate world of childhood, schools may have profound consequences for the thought processes of the individual. There is a good deal of evidence showing that many of the psychological changes once thought to represent the unfolding of the innate capacities of the human mind may actually be the result of literacy and the experience of going to school (p. 70).

David Moshman (1989) reviews the literature on children's cognitive development for the purpose of elucidating their rights to intellectual liberty. Moshman observes that arguments for abridging fundamental freedoms usually presume the capacity for choice as a prerequisite for freedom. The capacity for choice meriting adult freedoms, in turn, is measured by a level of rationality comparable to that of adults. "At the very least," he contends, "it seems clear that rationality has to do with reasons...Rational individuals not only make choices but have reasons for their choices" (citations omitted; italics original) (pp. 63-4). "We may define rationality," he goes on, "as *the self-reflective intentional, and appropriate coordination and use of genuine reasons in generating and justifying beliefs and behavior*" (p. 65).

Moshman describes the four different stages of deductive reasoning, which involves the ability to draw inferences from a set of premises. While few 9-10 year olds were capable of distinguishing inferential validity and empirical truth, this capacity began to emerge shortly thereafter. His conclusion after reviewing the research was that, while they are still not experienced reasoners, young adolescents cannot be distinguished from a minimally normal adult in the area of deductive reasoning (pp. 72-

3). Similarly, Moshman examines the research on the inductive reasoning abilities of children and adults.

> One might argue for restricting the information available to children and strictly guiding their conclusions on the grounds that they cannot adequately test the truth of ideas they are exposed to or conclusions they reach themselves; that they cannot distinguish facts from opinions, that they are incapable of dealing with uncertainties, probabilities or diverse points of view; or that they are simply naïve about the nature of knowledge (p. 73).

He describes inductive reasoning as the ability to form generalizations, to deal with uncertainties and probabilities, to test hypotheses, and to understand the nature of reality, knowledge and the relation between the two (p. 73).

Again, after reviewing the research, he concludes that adolescents beyond the age of 11 appear to be fundamentally as rational as normal adults in their ability to reason inductively. The research would seem to suggest that, if our basis for denying children rights of intellectual freedom are based on their ability to reason effectively in making decisions, the case to restrict access of materials and ideas to adolescent children may be severely impaired. In any event, the gradual emergence of rationality over the course of the childhood years, whether through innate developmental unfolding, or through the continued exposure to stimuli which require rational engagement, would seem to achieve adult proportions in the adolescent years.

Running parallel to children's intellectual development is their moral development. Even in the earliest years of life, the moral character of children is discernible. According to William Damon (1988), children have a nascent prosocial orientation which is shaped through the core moral emotions of empathy, shame and guilt, and anxiety over other people's violations of standards (p. 28) These provide "a ready-made affective structure upon which a child can build a set of deep and abiding moral concerns" (p. 29). This, however, is not accomplished in isolation but emerges primarily through social interactions with parents and peers.

What begin as raw affective responses to social situations are shaped into a full-fledged moral perspective through an increased understanding of the social order, including its principles of organization and legitimate authority, and of the reciprocity of sharing, cooperation and fairness needed to maintain relationships with peers (Damon, 1988, p. 117). These relationships require that the child come to understand the impact of her behaviour on others.

> While morality is thus deeply rooted in children's early social and emotional lives, it does not remain frozen at this early point. As we have seen, there is a rapid development in both sharing and morality in general throughout the childhood years. Children's understanding of fairness becomes increasingly elaborate as notions like equality, merit, benevolence and compromise are established. With this conceptual elaboration comes a greater consistency and generosity in children's sharing (Damon, 1988, p. 49).

What is significant is that moral maturation seems to coincide with the child's cognitive development. As the child's knowledge of the world increases, and her understanding of how things work becomes increasingly sophisticated, she becomes more and more adept at 'perspective-taking.' This sharing of perspectives, otherwise called 'role taking,' means mentally placing oneself in another's position and is clearly a critical component of social and moral judgment (Damon, 1988, p. 87). Damon's research of the literature leads him to conclude that, of the three basic techniques parents can use to transmit values to their children, power assertion, love withdrawal and induction, the last is the most effective. Power assertion means employing force to ensure the child's compliance; love withdrawal is the expression of disapproval or disappointment when the child deviates from the standard. Research has shown that once the asserter of power is no longer present, the child tends to revert to the old behaviours. Similarly, love withdrawal creates a need for children to conform to parental standards to obtain their parents' approval. Neither technique seems to lead to the internalization of the standard by the child himself.

> Induction means ensuring the child's compliance through some form of control, but at the same time drawing the child's attention to the reasons behind the standard. For young children, this often entails giving information about how bad behavior adversely affects others...Only induction has been found to foster such internalized beliefs. Children exposed to frequent inductions during disciplinary encounters tend to adopt their parents' standards as their own. The standards become 'functionally autonomous' (Damon, 1988, pp. 61-62).

To his detractors who would argue that morality is more a question of indoctrinated habit than reasoning, Damon asserts that he knows

> ...of no study showing that the development of moral reflection is inimical to the acquisition of moral habit. To the contrary, virtually all the relevant studies show that sophistication in moral reasoning goes hand in hand with consistent, reliable moral conduct (p. 144).

Of course the child's ability to reason morally is developmental. The role of reasons emerges as an increasingly important factor in guiding action. This can be seen in research which has studied the impetus to comply with parental authority at different ages of the rationale for obedience.[1] Damon points out that until age five or so, "children believe that they obey because they want to. There is only a shaky understanding that some commands conflict with one's desires and still must be followed" (Damon, p. 65). Children then move into a stage where parental authority is legitimized by indications of power, such as size or strength. By middle childhood, children come to view parental authority as legitimized by certain virtues such as superior intelligence and greater experience. Obedience is also a sign of respect, reciprocated for protection and nurturance. While this continues to hold true until later childhood, a growing sense of equality infiltrates the relationship. Adolescents will defer to leadership voluntarily, but when the parent is wrong, the child's deferral may not be forthcoming (Damon, pp. 65-7). This would seem to coincide with the years when nascent reasoning capacities become fully developed and the child is properly equipped to at least attempt to set out on her own. The progression through the stages of the legitimacy of parental authority seem to correspond to the increasingly salient role of reasons in guiding action. As the child becomes more sophisticated at understanding and utilizing reasons, she is capable of being inducted into modes or moral behaviour where those behaviours become, in Damon's words, functionally autonomous. The significance of moral development particularly as it is implicated in civic virtue is obvious. In terms of the thesis I am positing, the capacity to take others' perspectives and the inclination to rely upon reasons to entrench moral conduct will depend upon an open-minded disposition.

What can we extract from these developmental theories which will be useful to a theory of materials selection? I believe we can extrapolate several useful claims. The first is that, developmentally, there is a cognitive stage from birth until approximately seven years of age which is essentially impulsive and primitive. While reasons play a role in induction at all stages, the ability to process these is limited in the early years. The child's behaviour, because more impulsive, is generally not guided by particularly thoughtful judgment. Secondly, after a transitional period, this stage is followed by one in which the child's actions are manipulated by choices shaped by more sophisticated reasoning abilities, and by the ability to plan one's actions. Finally, the blossoming of her ability to process complex symbolic stimuli arouses the critical faculties and makes room for the arm of open-mindedness requiring rational deliberation in decision-making. These developing cognitive abilities have as many implications in the child's moral life as her intellectual life. These realms correspond to both personal autonomy, where one must decide what is best for oneself, and civic virtue, where one must comprehend the claims of others and give them their proper due according to justice. The development of both will rely upon open-mindedness. The emergence of this ability opens a window of opportunity to develop these abilities in the educational context.

Stage I: Open-Mindedness and the Inculcation of Beliefs and Values

These empirical claims are suggestive of a particular ordering, not only of the *kinds* of materials that are presented to children in curriculum, but also of the distinctive *objectives* we would formulate for successive stages. While the embryonic capacity to reason exists very early on, it is inconsistent and seems to play a different role. Rather than being *generative* of reasons for action, it appears to operate more as an identifier which *recognizes* reasons for action when these are pointed out by caretakers. Where compliance with parental authority is required, and where this is coupled with reason-giving for the appropriateness of a particular action, induction is likely to occur. But because reasons are not consistently generative of moral action initially, and because the capacity to reason is not sophisticated, much of what the child internalizes will depend upon the selection of particular virtues by the authority figure and the compliance with those virtues be exacted, albeit in the presence of reasons which justify the action. In the first stage, children are not capable of critically reflecting on their own values to any great degree. Developmentally, they are not primed to engage in rational deliberation. Rather, this is a time when children internalize standards and norms from the environment about them.

> It is undeniable, I think, that we seek to cause young children to hold beliefs in advance of their being able to rationally justify them. Parents and others spend quite a bit of time imparting to children a wide variety of beliefs – that they ought not to hit little sister, that they ought to share their toys with friends…We are agreed that such belief inculcation is desirable and justifiable, and that some of it might have the effect of enhancing the child's rationality. (Siegel, 1991, pp.32-3).

Some theorists dismiss this kind of moral education which is credal in nature as a 'bag of virtues.'[2] Inasmuch as truly moral conduct must be reflective of personal choice, these theorists are not to be condemned for disparaging the kind of 'moral' action prompted exclusively by rule-adherence. The move to 'character education' in schools is becoming increasingly popular. Damon (1988) comments on the trend to emphasize the acquisition of good behavioural habits rather than on the development of complex reasoning skills (pp. 141-2). He cites as representative educator Edward Wynne.[3]

> Wynne calls for a return to 'character education' approaches that focus on children's conduct and that are forthright in their espousal of traditional moral values. He believes that 'indoctrination' should cease being a dirty word in the educational community. Although he does not dismiss the importance of moral judgment, he considers it secondary to everyday, often mundane standards of conduct. In Wynne's stance one is reminded of Spinoza's old aphorism, "The palace of reasoning may be entered only through the courtyard of habit" (Damon, 1988, p. 142).

Damon points out, however, that the data are not on his side, and that studies indicate that there is little relation between exposure to such formal character education training and good, honest, responsible conduct in students.[4] While Wynne would extol indoctrination, Harvey Siegel takes an eloquent stand against it.

> What is so awful about indoctrination anyway?...If I have been indoctrinated...[m]y autonomy has been dramatically compromised, for I do not have the ability to settle impartially questions of concern to me on the basis of a reasoned consideration of the matter at hand. I am in an important sense, the prisoner of my convictions, for I cannot decide whether my convictions ought to be what they are, and I am unable to alter them for good reasons, even if there are good reasons for altering them...In being indoctrinated, I have been placed in a kind of cognitive straitjacket, in that my cognitive movements have been severely restricted. Worse, like the typical strait-jacketed person, I have also been sedated – drugged – so that I don't even realize my restricted plight (1991, p. 37).

How can we reconcile these divergent notions about indoctrination when an element of truth is perceptible in each strand? The cognitive swaddling of indoctrination does violence to the individual's autonomy; at the same time, it is difficult to get around belief inculcation in the early years because the child's rationality is not sufficiently developed to parse logical relationships. Finally, later autonomous thought may *depend* to some extent upon certain early belief inculcation. A complete repudiation of the inculcation of beliefs is too quick.

We can now return to our dilemma concerning indoctrination and attempt to resolve it. In the previous chapter, an argument was made that, although there is a presumption in favour of open-mindedness, this may be defeated, given sufficiently strong reasons for educating in an indoctrinary manner. The fact that children are not rationally critical of the beliefs they espouse at this stage, the fact that they need to hold *some* beliefs and have some developed dispositions in order to profit from open-mindedness, and the fact that these early beliefs may be particularly tenacious, suggest that it will be inappropriate to allow children the freedom to decide upon the value of certain traits for themselves, or to be indifferent to their acquiring certain beliefs and dispositions by default. Indeed anything short of a program to *deliberately cultivate* certain dispositions and beliefs essential to open-mindedness would be negligent.

This smacks of indoctrination, but I think we can fend against that criticism. It would prudent, at this point, to refine our terms somewhat. Siegel suggests that we must distinguish between those cases in which "the lack of justifying reasons is permanent and thought to be unobjectionable, and those in which it is temporary and tolerated only as a practical necessity" (p. 33). He claims,

> students are indoctrinated if they are led to hold beliefs in such a way that they are prevented from critically inquiring into their legitimacy and the power of the evidence offered in their support; if they hold beliefs in such a way that the beliefs are not open to rational evaluation or assessment (p. 31).

The key, then, is whether those beliefs can later be redeemed by recourse to reasons or whether they have been so entrenched that they are beyond the pale of rational assessment. He argues that clarity and educational theory are better served by falling on the side of the semantic debate which would distinguish these cases of belief inculcation from justified indoctrination (p. 33) This leaves intact the pejorative sense of the term indoctrination and removes justified belief inculcation from that class of unsavoury and morally prohibited teaching methods.

He further elaborates:

> [I]t is best to reject the idea that all cases of belief inculcation in which the believer is unable to provide rational justification for the belief are cases of indoctrination. It is better to reserve the label for cases…in which the beliefs are inculcated without justification; in which the state of affairs is taken as

> unproblematic, and acceptable as permanent, and in which an evidential style of belief is discouraged, and a non-evidential style encouraged, in this way we distinguish *indoctrination* from non-indoctrinative belief *inculcation* (p. 33).

Semantics aside, I agree with Siegel's distinction as there is clearly a morally relevant difference between the two kinds of teaching if the measure is the future autonomy of the child. I think, though, that he does overestimate the extent to which these inculcated beliefs and dispositions can be later redeemed. The boundaries he draws assume that beliefs are generally of the empirically grounded type, such as that the earth is round. His account does not really come to terms with the notion that many of these 'beliefs' have soaked into the deeper level of habits and dispositions, and that these are not so easily redeemed and discarded when children become capable of rational deliberation. In other words, they may well resist the kind of description which Siegel would call 'evidential' and instead become a part of a person's fibre. Siegel's defense that "the child can (and we hope will) question the reasons which recommend that habit as a worthy one" (p. 36) is optimistic.

Some liberals would suggest that we may *say* that we want children to come to test the value of open-mindedness or that persons are worthy of respect, or that it is a good thing to share with others. Indeed, we must rely on the tenacity of these virtues, the argument goes, if our commitment to autonomy and civic virtue are firm. So all the while, we have our fingers crossed behind our backs, and only the most intrepid liberals will *encourage* the vivisection of core liberal commitments, and be indifferent to the possibility that the values may expire on the operating table. But I am not prepared to adopt this perfectionist stance. My defence of autonomy and open-mindedness as an *instrumental* virtue would suggest a different tack. Indeed, the story of the redemption of beliefs and dispositions may felicitously unfold in the way suggested by Siegel, and the fact that we are educating for *open-mindedness* would suggest that those persons who achieve this virtue will be the only ones capable of questioning their fundamental beliefs. But a defence of the kind of belief inculcation I have advocated will be very precarious if it relies upon the prognosticated ability to redeem these beliefs. What justifies inculcation of virtues will hinge in part on the later ability to redeem them through reason (although this will be a difficult thing to do at best), but also on the justification that the virtues we attempt to inculcate are morally defensible dispositions because they *come as close as they can come to respecting the child's autonomic nature*. The tautological nature of this problem suggests that it will not be possible to nurture open-minded citizens *without* inculcating certain beliefs. *Even* if these cannot later be redeemed, we can in good conscience claim that we did out best. Finally, even though we may be inculcating certain beliefs and values, we cannot ignore the rational nature of the child even in this stage if we are to be successful at making these beliefs and values functionally autonomous. Successful induction and belief inculcation which allows beliefs and values to stand on their own and to be acted on in the absence of external authority, *require reason-giving.*

Paradoxically, all of this permits us to be more honest about the possibility that children may not be very successful at questioning and recasting certain dispositions which are typically viewed as necessary to autonomy and civic virtue. Whatever we might call it, that we recognize such practices to be quasi-indoctrinary in nature reminds us to be ever vigilant of the reprehensibility of such conduct generally. That we have momentarily rebutted a presumption against quasi-indoctrinary teaching means that we cannot repose at our leisure, for the circumstances which permit such inculcation, to wit, the young child's immaturity, change at a rapid pace. It is incumbent upon educators to keep a finger on the pulse of children's development and to structure curricular policy accordingly. And in any event, the role of reason-giving at all stages of development should not be undermined, although the reasons will serve different purposes.

As the child must begin with *some* set of values, whatever that starting set might be, and is in no position at the time to rationally criticize these, this stage effectively presumes belief inculcation. But we ought not to underestimate the enormous importance of this process in laying the stepping stones to open-mindedness itself, and indirectly to autonomy and civic virtue. Amy Gutmann argues for the necessity of the education of both moral character and moral reasoning:

> People adept at logical reasoning who lack moral character are sophists of the worst sort: they use moral arguments to serve whatever ends they happen to choose for themselves…But people who possess sturdy moral character without a developed capacity for reasoning are ruled only by habit and authority, and are incapable of constituting a society of sovereign citizens. Education in character and in moral reasoning are therefore both necessary, neither sufficient, for creating democratic citizens (1987, p. 51).

I want to argue that belief inculcation at this early stage is of fundamental importance in activating the motivation that drives the intellectual virtue of open-mindedness. In this I am supported by Trinkaus Zagzebski.

> So the motivational component of a virtue must be inculcated sufficiently to reliably withstand the influence of contrary motivations when those motivations do not themselves arise from virtues. The more that virtuous motivations and the resulting behavior become fixed habits, the more they are able to reliably

> achieve the ends of the virtue in these cases in which there are contrary tendencies to overcome (1996, p. 178).

The beliefs that we acquire initially *matter*. Empirical research continues to support the theory that much of who we are and what we become is greatly influenced by the early years. Of course, it would be hyperbole to claim that we become slaves to our early formative years. The very possibility of autonomy *depends* upon our ability to break free from early, quasi-indoctrinary teaching. Yet at the moment that we acquire our initial beliefs and establish our moral character and motivations, these elements are not critically reflected upon. They are, in a sense, absorbed from the social environment in which the child is incubated.

This is important because making good choices is not just a question of understanding how to apply rules, or even a question of being familiar with substantive dictates of right and wrong. Good choices are tightly wrapped up with certain dispositions, inclinations and feelings which fill out and then give life to a moral skeleton. As theorized by Trinkaus Zagzebski, virtues are *motivated* by emotions. Without this connective tissue, the skeleton is nothing more than a heap of inert bones which does not have the means or motivation to impel itself toward a moral destination.

Time and space do not permit a review of the research in the area, but I suspect that the early years are at least as developmentally crucial to the affective domain as they are to the development of the cognitive faculties. In other words, I suspect that it is during this time period that persons learn to be emotionally effusive or ascetic, whether to bury emotions as pesky distractions or to conscript them in service of moral navigation. It is during this period that we take our first steps in emotional attachments, to our parents, to a favourite toy, *and to our beliefs*.

In the later years, the content of beliefs comes under the critical scrutiny of rational deliberation with the flowering powers of reason. But the development of feelings would seem to follow an inverse ordering. Take for example, a seven-year-old boy who has been taught that boys should never cry. The likelihood of his carrying that into adulthood would seem high. And in the absence of some concerted, possibly therapeutic, attempt to recast this 'emotional learning,' there is no expectation that this feeling will naturally evolve. This is so because there does not appear to be a developmental window beyond the early years which is a natural span for emotional restructuring. Even the debut of reason promises little in the realm of emotions. We perhaps come to govern or control our emotions with our reason, but reason will certainly have a difficult task to conjure up emotions where they are not already extant.

In the context of our discussion, this means three things. Firstly, if feelings develop contemporaneously with specific substantive moral content, it would seem at least plausible that this initial bag of virtues will have a distinctive character. Although later maturation will permit children to re-assess their beliefs, they may nonetheless be more tenacious than other beliefs simply because they were forged in the same furnace as nascent emotions. Recall Gutmann's point, made earlier in chapter three:

> Children first become the kind of people who are repelled by bigotry, and then they feel the force of the reasons for their repulsion. The liberal reasons to reject bigotry are quite impotent in the absence of such sensibilities: they offer no compelling argument to people who feel no need to treat other people as equals and are willing to live with the consequences of their disrespect to

> cultivate in children the character that feels the force of right reason is an essential purpose of education in any society (1987, p. 43).

Secondly, it means that if children develop certain dispositions and acquire certain beliefs during this period, it is important that they be personally and socially positive ones. Finally, if we are to nurture the virtue of open-mindedness in children, whatever emotional component that virtue entails will need to be addressed in the early years.

How will the foregoing discussion inform materials selection in the context of curriculum? John Dewey remarks in his book *How We Think*:

> What can be done…is to cultivate those *attitudes* that are favorable to the use of the best methods of inquiry and testing. Knowledge of the methods alone will not suffice, there must be the desire, the will, to employ them. The desire is an affair or personal disposition. But on the other hand, the disposition alone will not suffice. There must also be understanding of the forms and techniques that are the channels through which these attitudes operate to best advantage (1933, pp. 29-30).

I shall not engage in an exhaustive listing of educational ends and virtues that ought to be nurtured. My interest is limited to the development of the virtue of open-mindedness, and in the first stage, the development of this disposition will be three-pronged: the concern for truth, humility in relation to one's held beliefs and the emotional aspects relating to rational deliberation.

It would seem that there are two types of inculcation which are essential at this early stage. The first might be characterized as 'substantive content', the second as 'procedural content.' This former relates to the development of beliefs and dispositions necessary to develop humility and a concern for truth. The nature of belief inculcation is not to leave dispositions and beliefs up for grabs – it is to embark on a positive course to instill particular attitudes and beliefs in the character of children. This substantive set must include a belief in and commitment to those things necessary to open-mindedness. We must provide the conditions which nurture a concern for truth and its motivation to know, as well as the conditions which instill a sense of humility in relation to one's held beliefs.

How are we to go about accomplishing this? Trinkaus Zagzebski gives us a starting point.

> What can be taught are skills such as the codified part of logic. Moral skills, such as procedures for grading fairly or processes for aiding famine-ridden countries that will have the desired effect can also be taught. What cannot be taught, or, at least, cannot be taught so easily, are intellectual virtues such as open-mindedness, the ability to think up an explanation for a complex set of data, or the ability to recognize reliable authority. These qualities are no more teachable than generosity or courage.
>
> I propose that the stages of learning the intellectual virtues are exactly parallel to the stages of learning the moral virtues as described by Aristotle. They begin with the imitation of virtuous persons, require practice which develops certain habits of feeling and acting, and usually include an in-between stage of intellectual self-control (overcoming intellectual *akrasia*) parallel to the stage of moral self-control in the acquisition of a moral virtue (1996, p. 150).

I think Trinkaus Zagzebski is correct in proposing that virtues are born of imitation of virtuous persons. As such, education for the virtue of open-mindedness will be less didactic than instructive by example. Of course, this would first entail the exposure of children to persons who exemplify the virtue of open-mindedness. Such models are not in short supply in the ranks of teachers, many of whom employ pedagogical methods designed to draw out these abilities in children. But my more circumscribed thesis is that the power of literature is a formidable ally in achieving the ends for which I have argued. It is the combination of teachers dedicated to the flourishing of their students' civic and autonomic capacities and the judicious selection of literary materials which can have a profound influence on the development of open-mindedness.

To this point, we have explored the cognitive and moral development of children. If we are to educate for open-mindedness, our plan must be consistent with those developmental models. In the early years and perhaps until adolescence, children's ability to utilize reasons in governing choice and action does not measure up to adult standards and justifies paternalistic intervention. At the same time, certain dispositions, values and beliefs must be inculcated in order to lay the bedrock for later rational choice. I have suggested that the use of literature in the classroom may be one of the most effective methods of establishing the fundamental layers of the virtue of open-mindedness. To substantiate that claim, it will be important to examine the research on reader theory and to discover how reading literature influences children.

J.A. Appleyard (1990) undertakes to construct a theory of how people read literature by elaborating a developmental view which recognizes regular sequential stages from early childhood to adulthood. Appleyard views the trajectory of reading experience "as a movement from unreflecting engagement to deliberate choice about the kind of readers we will be and the uses to which we will put our reading" (p. 19). Interestingly, these two ways of reading which occur at opposite ends of the developmental spectrum have spawned two different, and often conflicting, trends in literature education.

The engagement view of literature emphasizes the aspect of reading which is the process of interaction between the text and the reader, a view pioneered by Rosenblatt.[5] Through interaction with the text, enculturation and personal transformation are said to take place, particularly through the selection of materials based on identification and relevance.

> Psychic change presupposes the possibility of enlisting the reader's sympathies positively in the process of inhabiting other lives and worlds; and literary content is deemed appropriate to the literature curriculum, at least in part, on the basis of how it is thought to reflect and shape attitudes in tune with the prevailing social issues (Bogdan, 1990, p. 204)

Proponents are unapologetic for engaging emotions, sometimes powerful and evoked through the reader's experience of the story, in effecting the desired outcomes. Literature has an emotional force which has the power to change lives through the reader's vicarious experience of it. Two possible selection policies emerge from this view of literature. Firstly, choices can be made on the basis of whether students can relate to and identify with the material, because this is seen as being of the utmost importance. Alternatively, it may entail the selection of stories which mirror those virtues thought noble and which concomitantly elicit strong emotional reaction with the agenda of cementing those virtues.

This view in reader theory Deanne Bogdan contrasts with what she calls the 'mortification of feeling' argument. This approach to literature promulgates detachment from the text and views the literary work as something to be analyzed and criticized from the safe distance of the objective bystander. Affective responses are a distraction in an exercise which edifies rational deliberation.

These two views are conflicting inasmuch as they typically do not adhere to and evolve according to a developmental model, but attach to what is perceived to be the ultimate end of the use of literature in schools. In other words, the goal of preparing the student for rational deliberation precipitates a 'pedagogy of detachment' as the major methodological approach, whereas the philosophy that literature should serve to inculcate beliefs (usually supportive of particular social ends) enlists methodologies which reflect a theory of engagement. What is missing, I think, is a coherent theory which takes account of developmental theory of reading and which integrates both worthy objectives into a cogent theory consistent with an education for open-mindedness.

I have already argued that the development of the virtue of open-mindedness will require the timely inculcation of certain foundational beliefs followed by the opportunity to rigorously engage nascent critical thinking abilities. It makes sense to me that if we superimpose reader theory upon cognitive and moral developmental theory, it will yield an eclectic theory which will give both engagement and attachment views their due while respecting the changing abilities of the child. What is more, a curriculum which emphasizes belief inculcation first, followed by later rational deliberation, corresponds neatly to the developmental theory of readers put forward by Appleyard.

It would be an exaggeration to suggest that even very young readers (or children who are read to) simply absorb through some osmotic process whatever they read or hear. Even a very rudimentary understanding of the world will structure it to some extent, although the child's world seems to be remarkably tolerant of internal inconsistencies. Appleyard's review of the literature suggests that

> [very young children] appear to inhabit a world of highly personalized concrete images that are woven together in fragile relationship and are intensely involving. It is a timeless world where appearances and identities readily change and where contradictions lie undisturbed side by side, an animistic

> world where a little boy in a story or a princess sleeping because of a poisoned apple are as real as the rain or toy blocks or a playmate (p. 26).

Although each stage exercises capacities that transcend qualitatively those possible in earlier stages, Appleyard admonishes us not to relinquish the positive aspects of reading as a child, and that integration of all stages will capitalize on these strengths (p. 16).

> On the one hand, it is undeniable that schooling is to a great extent a matter of teaching children eventually to think abstractly, even about literature, and to express themselves ultimately in the discursively organized prose of the formal essay. Yet so many of the qualities that account for the power of stories and poems and even essays seem to be bound up with the characteristics of childhood thinking that, from this point of view, the developing student is to grow out of: its concrete imagistic, sensory character, its wealth of personal meaning, its freedom from the constraints of analytic reasoning, and above all, its power to involve us emotionally. Anyone who has ever read stories to young children knows how deeply they can engage their feelings and how lasting an imprint they can have on their imaginations. If the world of young children is magical and numinous, it is not only because of the way they think, but also because of how they feel (p. 35)

This early childhood stage of reading extends to approximately first or second grade, and is followed by Appleyard's second stage (6-12) which is marked by the reader as hero or heroine. In this next stage, the child increasingly uses literature to gather and organize information and to satisfy the child's curiosity about the world beyond her immediate experience (p. 58). Margaret Meek (1982) suggests that reading at this age focuses on issues of identity and this leads the child to the kind of adventure of literature that has as its principal character archetype a clever or powerful hero or heroine. Appleyard comments that "the prominence of this archetype suggests that a main reward for reading fictional stories at this age is to satisfy the need to imagine oneself as the central figure who, by competence and initiative, can solve the problems of a disordered world" (p. 59). Thus he suggests that readers at this stage "imagine themselves as heroes and heroines of romances that are unconscious analogues of their own lives" (p. 60). The child's ability to distinguish fantasy from reality now does not mean that the affective response to reading stories has disappeared. But it is now paired with the child's need to imagine his own effective agency through the reading of adventure stories that glamourize competence, skill and mastery (Appleyard, pp. 69, 75, 83). These two factors, the ability to be emotionally engaged by a story without subjecting it to critical scrutiny, and the need to rub elbows with heroes and heroines whom they might emulate for their skill and virtue, make the time ripe to inculcate those beliefs and nurture those dispositions upon which open-mindedness depends.

We return to those very underpinnings of open-mindedness. The concern for truth implies a desire to know. The concern for truth will demand both a curricular and a pedagogical emphasis on truth and truth-seeking. At an elementary level, there must be an emphasis on the value of truth. Both by example and in literature, truthfulness must be lauded and lying censured. This could then be fortified by the nobility of truth-seeking behaviour. Language Arts might incorporate stories where noble characters embark on searches to find elusive truths, or where dedicated scientists engage in experiments to discover solutions to problems. Rather than finding stories to reinforce that 'curiosity killed the cat,' teachers might turn to literature which values curiosity by featuring characters who are engaged in the world around them and who thrive on exploration and discovery. Children must be brought to feel, both personally in the classroom, and vicariously through other characters, the intrinsic worth of knowing – not only its instrumental value, but the self-satisfaction, and even joy, of coming face to face with truth. It is noteworthy that the etymology of the word 'question' is related to the 'quest' – a search. This metaphor of the heroic quest to discover unknown and valuable riches captures the adventure for children of the role of open-mindedness in questioning and thereby unearthing new possibilities. The heroes of these stories will not shy away from re-directing their allegiance because their friends might tease them, or they might be considered weak-minded. Indeed, they will embrace new knowledge and the change that it precipitates.

The virtue of open-mindedness will demand the concurrent cultivation of the disposition of humility with respect to one's beliefs. This must be construed in relation to others. It will be nurtured in an environment where the opinions of others are heard and are perceived to have some merit. In this sense, the classroom where the ideal of open-mindedness is operative will be conducive to the development of humility while the authoritarian classroom which brooks no input from the students will defeat this. While children will not always find the views of others to be correct, the airing of views is important in generating respect for others, who will often be a resource to the truth that will surely impact on one's decisions for action. Humility grows out of the experience of being wrong, but this need not be a *humiliating* experience. Indeed, to foster a *healthy* humility, being wrong must not be seen to be something of tremendous import, or something for which we would perceive ourselves to be morally blameworthy. This is antithetical to the development of humility which open-mindedness requires as it is prone to backfiring. Censure for holding incorrect beliefs will often cause the person to dig in her heels, so to speak. Rather than seeing the incongruity as an impetus for change, the person may well be motivated to hold on to incorrect beliefs even more tenaciously and to simply avoid confrontations which might bring discrepancies to light. Healthy humility will grow out of an environment which allows a sharing of views and which is demanding of respect for all who share. Errors in belief will be seen as a positive impetus for revising beliefs and not as a traumatic experience calling for censure.

We now turn to the second category of belief inculcation in the first developmental stage which might be characterized as 'procedural content.' R.S. Peters writes:

> It is difficult to understand how a person could come to follow rules autonomously if he had not learned, from the inside, as it were, what it is to follow a rule. And children learn this, presumably, by generalizing their experience of picking up some particular bag of virtues (1979, p. 198).

This procedural content would include not only what it means to follow a rule, but also the value of reasons, and an understanding of the role they ought to play in coming to moral decisions. These decisions arise not only in the context of arriving at appropriate conclusions with respect to how one ought to act, personally, but also in how we judge actions generally. This proposed procedural 'bag of virtues' is by no means exhaustive, but comprises a minimum set of dispositions which must be laid down in order to enable students later to engage in the rational deliberation component of open-mindedness. This set deals with the inculcation of beliefs and dispositions necessary to lay the foundation for later rational assessment.

Procedural content will further require the development of *feeling* that reasons are important in decision-making and actions. Recall Damon's description of the importance of reason-giving to the induction of moral virtues. The strategy of asking "Why?' ought to include simple empirical problems, such as why water turns to ice, but the inevitable, and invaluable progression ought to encompass the questioning of the reasons for personal choices. Stories and books which emphasize the motivation of characters and their reasons for acting will be exemplary.

But how does one generate reasons outside of one's experience which one comes to feel as important? I suggest that the development of the sympathetic imagination is key to this enterprise. While ratiocinative skills will have a growth spurt in later years, I think that the nascent feeling of the importance of reasons to action and decision-making is conceived in this stage. There will be a tendency in later years to emphasize the objective evaluation of reasons, but I think that *this will be inadequate to cultivating the emotional motivation necessary to entrench the intellectual virtue of open-mindedness.* We must learn how to generate reasons by understanding and practicing the exercise of sympathetic imagination by 'putting oneself in the other's shoes.'

> The sympathetic imagination is a capacity for a certain kind of vicarious participation in the lives of others – a capacity to imagine how the world might look given beliefs very different from one's own, how it might feel to be thwarted in endeavours which seem pointless to oneself but are pivotal to another's sense of life's meaning, and so on (Callan, 1991, p. 79).

It is the practice of imagining sympathetically – of putting oneself in the other's shoes, so to speak – which leads to the realization that the truth is not the exclusive property of one individual or group alone, but that it makes its home sometimes in the unlikeliest of places. The perception that one is not the sole sentinel of the truth, and that others are possible sources, makes way for the humility essential to open-mindedness. But more than this, one can feel the power of reasons in real lives, with which one can identify as fellow human beings.

It will be difficult to categorize materials selection at this stage as inclusionary or exclusionary. In fact, there will be an essential tension between the goal of exposing students to a broad range of materials in order to allow them to *practice* the exercise of sympathetic imagination, and the goal of being discriminating about the *content* of the materials to present children with admirable models to emulate. Texts which purport to engage the sympathetic imagination will be selected in such a way as to reflect an ample variety of characters who meet their problems with different perspectives formulated from different beliefs and values. These texts should invite the young reader to put himself in the position of the protagonist, to see the world with different eyes. This emphasis on inclusionary policy should be counter-balanced by the equally legitimate responsibility to preserve children from acquiring a tainted bag of virtues.

I have argued that the content of the initial bag of virtues is significant and more than mere fodder for later critical thinking. It is a collection of substantive dispositions, feelings, and emotions which may attach themselves in a deep way. To the extent that these components are influenced by an engagement with literature and other materials, we must ensure that those materials are thoughtfully selected. If the engagement thesis is correct and children's characters are influenced by what they read and see, then it is ingenuous to think that children will only be influenced for the better through indiscriminate exposure to books and movies, and to the power of the ideas contained therein. This is so particularly during this elementary stage when children are not developmentally equipped to critically assess ideas.

How, then, do we separate the educational wheat from the chaff of available materials? I would argue that an important standard for materials selection will be whether particular materials are conducive to the development of the virtue of open-mindedness. Schools need not, indeed should not, utilize materials whose purpose or effect it is to undermine its development. This will mean that school boards, teachers and administrators will walk a tightrope during this stage, trying to find the right mix of inclusionary and exclusionary practices, but so long as both governing principles are kept in the foreground, the task is manageable. The teacher will ask firstly whether the selection is appropriate to excite those capacities required of the sympathetic imagination. Secondly, does the selection foster the development of those dispositions of humility and a concern for truth necessary to open-mindedness? The only time there will be a concern will be when the particular text would be valuable to sympathetic imagination, but would *undermine* those substantive beliefs we attempt to inculcate. In those cases, the teacher will usually reject the candidate text, although a case may be made that there is an over-riding interest in engaging the sympathetic imagination in a particular case.

Stage II: Open-mindedness, Critical Thinking, and Exposure to Ideas

The first stage eventually gives way to the heightened capacity for rational deliberation. This is not an all-or-nothing proposition. Children become more and more capable of critical thought, but they do not suddenly inherit all the skills and dispositions of a mature decision-maker. As with any potentiality, its perfection is achieved through diligent practice. The point to be made is that this is a continual process, and as such, curricular policy must accommodate the continuity of the process from the critical neophyte to rational being. In the first stage, the groundwork was laid for the next stage: If all has gone well, the child will have emerged with a concern for the truth and will be possessed of at least the seeds of the virtue of humility; he will also have come to understand that reasons are indispensable to discovering truth. He will have had occasion to develop these as the sympathetic imagination took form through his exposure to literature, and in his interactions with peers and family. And he will have become aware of the role reasons will play in deciding his own actions in the future.

Now the blossoming rational capacities are conscripted to bring the project of educating for open-mindedness to fruition. The earlier argument for the ability for rational deliberation as a component of open-mindedness informs the objective of education in this stage. If we are to enable children to embrace and lead the autonomous life, the time comes when we cannot be tightfisted about the ideas with which we will allow students to come into contact. It is incongruous to pay homage to autonomy while effectively closing off that avenue by pre-digesting ideas into inoffensive pap.

The concern, of course, is that if we permit students access to controversial ideas, or if we expose them to literature and materials which portray less than exemplary characters, students will somehow be abducted from virtue by unsavoury ideas and models. The impetus for censorship of reading material is premised upon the assumption that the material will have a deleterious effect upon the reader, and further, that the reader will be helpless to intercede in the process which will kidnap her unwittingly. There is some merit to this concern. If we presume to defend literature as a vehicle for moral education, we must confront the basic philosophical challenge that if literary knowledge can influence for the good, it can also do so for the bad. This epistemological claim has particular force in a theory which views the reader's personal engagement with and reaction to the text as unassailable and the ultimate end to be promoted in the study of literature.[6] But while that model may be appropriate to pre-school and elementary aged children (and it is for that reason that I proposed both an inclusionary and exclusionary policy in the selection of materials in that stage), I think the concern that adolescents will sponge up whatever they read is unwarranted, just as I believe the engagement model of reader response loosens its grip in this stage that Appleyard calls 'Adolescence: Reader as Thinker.' To be sure, adolescents (and even adults) are still engaged by texts, and it is the power of emotions which bring the vicarious experience of a text alive and the issues they raise, relevant. But readers at this stage acquire a level of sophistication which does not permit automatic entrance of any idea into their world independently of its merit. My claim is that literature continues to influence, but it influences *differently*.

Referring to Piaget's account of adolescents' cognitive development, Appleyard observes that the young adolescent comes to escape the confines of concrete thinking, but can think hypothetically and can imagine possible alternatives. "This opening up to the possible," he says, "is what allows an adolescent to think about the future, to construct theories and ideological systems, to develop ideals, to understand others' points of view…Correlative with this is the ability to think about thinking, to reflect critically about one's own thoughts" (p. 97).[7] Students in this stage, when asked about what makes a story 'good,' mentioned involvement with the book and identification with the character, the realism of the story, and the fact that the story 'made them think' (Appleyard, p. 100).

> Thinking about the implications of a story may seem to be at the opposite pole from being wrapped up in the experience of it, but the connection between the two responses lies in the adolescent's new way of making the world meaningful. The adolescent has become what the juvenile was not, an observer and evaluator of self and others, so it is an easy step from involvement in the story to reflecting about it (Appleyard, p. 101).

Adolescents are capable of identifying with a character (and indeed *more* than one character) in a story,[8] but D.W. Harding (1968, pp. 308-16) questions the aptness of the term identification to describe a reader's involvement with a character. Although the reader empathizes imaginatively, this is not in the sense of vicarious experience or wish fulfillment. Rather, the reader occupies the dual roles of 'participant' in the story, as well as that of 'spectator,' who evaluates or reacts to the character. Readers differentiate clearly between themselves and the character.

> There is a paradox about the whole matter of teenagers' involvement with a story. As Applebee shrewdly notices, to say that you are involved means that you no longer are, at least not to the unself-conscious and spontaneous way that you were before you identified and labeled your involvement. The truly involved reader is the preadolescent, absorbed in what C.S. Lewis (1966) calls the 'atmosphere' and Nell (1988) 'entrancement'; once the experience is named, it becomes a *possible* response, one that may or may not occur, a response that is psychologically distanced by the recognition that it is only 'like I was there' (Applebee 1978, 112). This is wholly consistent, of course, with the adolescent discovery of the self. It suggests, too, that Harding's distinction between participant and spectator roles reaches a new level of self-consciousness in adolescence and that all subsequent responses to stories will be marked, to a greater or lesser degree, by some sense of the division between the experiencing and judging self (Appleyard, pp. 106-7).

Appleyard suggests that adolescents no longer take what they read for granted as pictures of the world, but recognize that they offer points of view and ways of feeling that ultimately must be evaluated (p. 119). He cites Harding's view of reader's responses:

> Any but the most naïve kind of reading puts us into implicit relation with an author. A novelist (or a playwright) may be directing our attention mainly to the action and experience of his characters and part of our job is to enter imaginatively into them. But he is at the same time conveying his own evaluation of what is done and felt, presenting it (to mention simple possibilities) as heroic, pathetic, contemptible, charming, funny…and implicitly inviting us to share his attitude. Our task as readers is not complete unless we tacitly evaluate his evaluation, endorsing it fully, rejecting it, but more probably feeling some less clear-cut attitude based on discriminations achieved or groped after (Harding, 1978, p. 201)

This would seem to correspond to the findings of a survey of research on response to reading by David Beach. Beach comments on the relationship between age, literacy training and response.

> A number of studies find that American students' responses to reading show a progressive development from predominantly an emotional/engagement type of response in the elementary grades to increased description/retelling in the junior high grades to a decline in engagement and description and an increase in interpretation in the senior high school grades (Pollock, 1972; Thompson,

> 1973; National Assessment, 1973; Purves, 1973). This development towards more interpretative analytic response reflects the type of literary/critical instruction characteristic of American secondary education (1979, pp. 140-1).

He further notes that a number of cross-national studies detect a correlation between reader response and the critical approach emphasized in a particular country's curriculum, although the curricular differences seem to have less influence on the younger students than on the senior-high age students (p. 141). This makes sense. If elementary school-aged students are not yet adept at critical thinking, it makes sense that they are locked into an engagement model, even though the *substance* of the material with which they will become engaged will vary. But as students become increasingly proficient at rational deliberation, their success in this area will correspond in part to whether or not the curriculum encourages this. As a result, the senior-high aged students in one country might respond with more evaluative response (such as in Britain), or with more biographical response (as in Italy) (Beach, p. 141).

Given this, it would appear that the evidence for the assumption that coming into contact with certain materials is hazardous to students may be frail. During this second stage, the grip of engagement with a text is loosened by newly acquired developmental filters. It is assumed that reading changes people, and indeed, my argument for open-mindedness depends upon the proposition, but the generality of that claim makes it difficult to identify and harness the real utility of literature. Beach, for example, indicates that the general trend of research suggests that reading does not have much short term effect on adolescent readers' behaviour, and that readers have relatively stable and defined characteristics which shape the experience with a work, to a greater extent than the work affects the characteristics of the reader. Readers' attitudes and behaviour are also influenced by parents and peers (p. 144). Beach summarizes that readers thus tend to respond positively to aspects of reading that reinforce their values and suppress aspects that threaten them (p. 145). He refers to Thayer and Pranko's (1958)[9] study in which readers ascribed positive traits to characters they liked and undesirable traits to those they disliked; in another study[10] readers did not identify with a character when that character's behaviour was unacceptable.

But that does not end the story. Beach points out the dearth of research on the long-term effects of reading. This may simply reflect the difficulty of tracing the evolution of values back to its source since the source is often multi-faceted. Nevertheless, it would seem that that is the kind of data which would be required to make the case that reading influences readers and helps to shape their values. The problem Beach identifies with studies of the short-terms impact of reading is that "this runs counter to much social science research indicating that people's values or attitudes change only gradually over a long term" (p. 144). Shirley (1969) further clarifies that the nature of attitude change depends on subjects' own unique psychological orientation toward reading. Interestingly, an indifferent reader will not be as influenced as a reader who becomes very involved in his reading.

If values remain relatively stable, one wonders what all of the fuss is about. Indeed, why even *bother* with books and exposing adolescents to ideas if our efforts are largely ineffectual? The irony is that arguments for broad exposure to literature are often based on the same reasons that arguments *against* exposure rely upon: that reading books *does* indeed have an impact and changes people. One camp fears that

that change will be for the worse, while the other is adamant that it will be for the good.

As long as both arguments rely upon the engagement hypothesis of reader theory, the two groups will be doomed to an impasse, for the theory is not partisan and impartially lends its support to both sides of the debate. Deanne Bogdan characterizes the argument as a double-edged sword which cuts both ways. Interestingly, not only do opponents on both sides of the debate wield the same sword, but censors on both the left and right wings of the political spectrum have a firm hand on the hilt. Religious fundamentalists, feminists and other advocates of political correctness, and liberals have all reached for the same weapon. Bogdan comments on the arguments raised to counter attempts to censor four impugned school novels used in Ontario.

> Peppered throughout the defences and letters of support for the four Peterborough novels are justifications on the basis of social relevance through sympathetic identification in statements such as 'students can relate to this novel,' or 'this book helps adolescents to see life as it really is,' as self-evident arguments in favour of the moral value of a literary work. Rather, these statements are articles of faith in a particular kind of curriculum philosophy, which assumes that readers necessarily become what they behold by absorbing what they behold through osmosis, and a pedagogy that fixates on emotional engagement with the text to the exclusion, at least the denigration of critical analysis (1986, p. 208).

The problem is that teachers and policy-makers have had difficulty in finding a permanent place to hang their hats. At one moment in history, the hook labeled 'critical analysis' was most inviting. At another, it seemed the wrong place to be, and educators hurriedly found a new hook labeled 'engagement theory.'

> The choice between the fusion of literature and life and a pedagogy of engagement on the one hand, and the separation of literature and life and a

> pedagogy of detachment on the other is painful…I believe that an either/or solution is unnecessary. My conception of literary literacy would embrace both engagement and detachment, both the feeling of coming to know certain truths about oneself and/or the world, and getting distance on that feeling. The acquisition of literary literacy would enable students to read literature as assertion, as a form of knowing, and as a hypothesis, as a form of questioning (Bogdan, 1990, p. 209).

I believe that Bogdan is correct in rejecting a mutually exclusive conception of the engagement and critical analysis models. The pedagogical practice of teaching to whichever model happens to be currently in vogue neglects what must be the touchstone for shaping curriculum: that values education must be informed by philosophically defensible principles and objectives and that its implementation must reflect the empirical data on human development. Complete adherence to one or the other model contravenes these guidelines.

What, then, is the role of materials during this second stage if we can no longer sustain belief inculcation either philosophically or empirically? And what do we do about the contrary worrisome point raised by Beach that the impact of reading has not been substantiated? I am convinced that the presentation of various materials to students still plays a crucial role in the development of both the emerging critical thinking skills and the shaping of values. The power of literature at this time is its function in raising up issues *and inflicting them on our consciousness*. What literature has lost in its ability to mold our values by merely presenting them in an emotion-packed story, it now gains in its ability to pique our rational capacities which are similarly critical to open-mindedness.

The role of providing food for thought ought not to be underestimated. One might resignedly accept from Beach's conclusions that literature now plays a bit part, but such pessimism would not only be unwarranted, it would also tragically lead us to shelve a powerful aid in the development of critical skills. Literature forces us to confront situations and ideas we have never encountered, and might never even imagine, under other circumstances. And even if we have previously thought about a particular idea, the chance for re-examination at different phases of our lives, with more experience under our belts, is a worthwhile opportunity.

Our own personal experience is incredibly limited against the rich background of human possibility. The act of bringing into relief aspects which heretofore blended into an indistinguishable moonscape is an invaluable service. It is only by becoming *aware* of alternatives and possibilities and by having the opportunity to bring to bear one's own critical faculties to those possibilities, that students can properly be disposed to open-mindedness. It is the portrayal of the very diversity of possibility which is the service of literature. One story will invite a reader to view a problem through certain lenses; another will encourage the reader to don different coloured glasses, or lenses to address myopia rather than far-sightedness. While the adolescent may not experience an epiphany with any given work of literature, the very awareness of other points of view different from her own, will certainly entice her to consider these. This is the first step toward eventual change and refinement of values.

Exposure to ideas plays another related role in the development of open-mindedness. We will recall that open-mindedness must be completed by some ability to think critically, or the plethora of alternatives and choices that we face everyday will remain at arm's length. Unless some capacity exists which assists us in viewing options in a proprietary fashion, alternatives remain alien. The ability to deliberate rationally thus bolsters open-mindedness. The point I want to make is this: *We will not learn to critically reflect on beliefs and values unless we are confronted by controversy.* Controversial ideas allow children to try their hand at critical thinking; without contentious issues to deal with, it is questionable whether children can learn even the minimal skills required to give substance to the virtue of open-mindedness.

So diversity will be important to the open-mindedness intrinsic to autonomy and civic virtue in several ways. As we impose our own reason on diversity, we take the autonomic step of culling possibilities for our own moral choices. Moreover, it lays the field for the engagement of the burdens of judgment as our civic duty. Literature and other materials embellish our own sparse experience in the post-primary stage and curriculum should be informed by this influence. Not only does broad exposure to ideas permit us to choose those which we ultimately decide to be most worthy, but it enables us to exercise that very critical capacity which will empower us to choose what is most worthy.

Given that diversity is important to open-mindedness and that it is alarmist to worry that students will absorb ideas by osmosis, how are we to structure curriculum? I contend that the gradual development from engagement with literature to critical thinking about it will dictate a corresponding movement from the tightly constrained inclusionary/exclusionary policy of the first stage to a presumption in favour of inclusion in the second stage. In other words, the need to examine one's own beliefs and the beliefs of others weighs heavily in favour of liberal access to materials, even to objectionable materials in the critical stage. Two caveats are in order. Firstly, the development of the critical faculties is a gradual process and a gradual movement towards liberality is appropriate. However, by the time students reach the senior high school age, there would seem to be little reason to withhold materials, given that their reasoning abilities are as acute as those of many adults. The student may lack the judgment acquired from experience, but that is exactly the point of providing them with alternative points of view from the safely vicarious position of literature.

Sadly, proponents of censorship fail to recognize that, for many students, the high school represents the last forum where students will be encouraged to objectively grapple with controversial issues and to discuss them in an academic setting. Many students do not go on to post-secondary education, and even if they do, are not exposed to the kinds of courses which demand that they step back from an issue to dissect both passionately and dispassionately. After high school, many are left to their own resources to make important judgments without the benefit of a teacher, whose fiduciary function it is to guide students to their own autonomic abilities, or the benefit of other students who will voice contrary opinions in open debates, the purpose of which is to arrive at the truth. It seems obvious that the right moment for introducing controversial ideas is indeed during the school years, for the external constraints are far more conducive to arriving at the truth.

The second caveat is that 'liberal access to materials' is not to be understood as advocating a bacchanalian literary orgy for curricula. Literary materials must continue to be selected on the basis of educational relevance and literary merit. This is nothing new. The sheer volume of materials, from pulp fiction to Plato's Republic, requires that we choose some materials and exclude others. But liberal access to materials does not lead inexorably to the staging of some kind of curricular materials lottery. Rather, the materials to be selected must be consonant with the objectives of the educational enterprise. Schools are institutions whose mandate it is to *educate* – to make possible the autonomous life, and for life as a citizen in a liberal polity. Thus, the selection of materials is circumscribed by their pertinence to these general objectives. The interpretation of relevance in this context will be broad indeed, but some types of materials will not contribute significantly in an educational sense. In that case, the materials will be inappropriate, not because they might bring students face to face with a controversial issue, but because there is no *issue* per se to confront, or the issue bears virtually no educational significance.

Take, for example, the suggestion that a liberal approach to materials access in school might be construed to mean that teachers could show pornographic films to their students all day long. I contend that this does not follow from the argument I have put forward. Material must still conform to the objectives which define this stage: autonomy and civic virtue provide the general boundaries, but, more specifically, the material must foster the critical thinking component of open-mindedness. It is difficult to see how the pornographic goal of titillation can be reconciled with the detachment necessary for rational deliberation. The *issue* of pornography is an important one for citizens to debate, since the tastes of some must be balanced with the countervailing interests of women to be free from the alleged harm of stereotypical and sometimes violent images of themselves, or the harm to society caused by child pornography, 'snuff films,' and so on. But that debate is more likely to be strangled by exposure of students to typical pornographic fare.

Materials must also be selected according to their educational relevance. It would be a bold claim to state that all Harlequin Romances are trashy and a lamentable reason for the loss of good trees. In fact, many people *do* derive enjoyment from such literature, and that enjoyment ought not to be discarded so flippantly. But we can respect the rights of persons to choose entertainment of this nature without having to surrender the English curriculum. It is fortuitous, of course, that students actually enjoy the selections which are made, but this is only one criterion of a selection's merit. Harlequin Romances have little else to recommend them. It would take more space and philosophical acuity than I am able to muster at present to enumerate all legitimate educational objectives, but it will suffice to say that many types of materials may be passed over with this general statement alone.

Finally, the theory of materials selection posited not only makes it unlikely that certain materials will become a part of curricula, *but it also imposes positive guidelines on certain materials which must be included.* The core of education is the facilitation of autonomy and the development of civic virtue. That is not to say that there are no other legitimate ends. The aesthetic appreciation of art, for example, must surely be a legitimate aim, yet it does not fall so neatly into the categories mentioned. But education for autonomy and citizenship education are *minimal* standards for curriculum.

What this means is that teachers, administrators and school boards cannot simply gloss over the ideas embodied in many types of stories simply because they are sure to generate controversy and heated reactions from parents or others. It has become de rigeur in schools to allow students to choose their own materials from a pre-approved list. Although each selection on the list will have gotten the nod for its educationally relevant themes, there is no *mandatory* exposure to materials which incorporate issues of overriding educational concern. Even where teachers are free to select texts for common consumption and debate, this is typically done from a board-wide roster of approved materials. Again, there is often no requirement that particular topics or issues be addressed. Although school boards usually have a broad array of materials which cover most if not all educational objectives, the lack of guidelines prescribing exposure to materials reflecting issues of significant concern in terms of civic virtue and autonomy is a serious flaw.

Consider a case recounted to me by a teacher. He had, as part of a lesson on utopic societies, posed the question to the junior high students, "If you could change two things about society to make it better, what would they be?" When the teacher reviewed the responses, he found, to his chagrin, that well over half the class had answered that they would "get rid of the homosexuals," some of them elaborating with violent detail. That students would point to the eradication of homosexuality as one of the most positive social changes to be effected, above even contenders like world hunger, or racially motivated wars, is cause for distress. But the importance of addressing the issue of homosexuality in an objective fashion is belied by the scarcity of materials which might lead to discussion. Publishers simply do not want to introduce such volatile literature which is sure to raise the hackles of censors on the watch for corrupting influences. Even teachers are tainted by the desire to avoid controversy. The problem is perpetuated by the failure to prescribe in curriculum materials which will ensure discussion of the issue. That teachers and publishers do not want to face the firing squad as martyrs is understandable. To do so in many cases would be to commit professional suicide. But if the objectives are legitimate, *then materials selection of controversial materials must be mandated.* The proper locus of responsibility does not reside in the individual teacher or publisher. The answer is a systemic one: the educational system, as one mechanism set up to make available to persons the autonomous life, and to ensure the development of citizens of a liberal democracy who can properly discharge the burdens of judgment, *must ensure, through its curricular selections, that students come face to face with certain controversial materials consonant with these objectives.* The possibility of nurturing the virtue of open-mindedness *depends* upon being confronted by alternative points of view. It likewise requires grist to practice critical thinking in order to keep opportunities presented by open-mindedness alive and real possibilities. School boards are thus enjoined to fulfill this mandate by vetting materials (or at times, *commissioning* materials) and sorting them into categories described as 'prescriptive,' 'permissible,' and 'educationally inappropriate.'

Open-mindedness and the Fundamental Concepts of Disciplines

The discussion to this point has focused on materials selected to correspond to the nurturance of dispositions supporting open-mindedness in the first stage, and of the development of critical skills in the latter which requires liberal exposure to controversial ideas. There is a third category which does not fit comfortably into either of these. It may have occurred to the reader that relatively little has been said of specific substantive concepts, the acquisition of which occupies a good part of the scholastic day. One might have gleaned from what I have said to this point that laissez faire materials selection is wrong-headed. Rather, the importance of intellectual freedom in the moral life of an agent paradoxically precipitates curricular constraints. This familiar pattern revisits us in the area of substantive concepts.

Strike reminds us of our starting point:

> *Human beings are ends in themselves and are moral agents who are responsible to choose wisely on their own behalf and act justly with respect to others. They are morally responsible for what they choose and what they do.*
>
> A moral agent who is responsible for his choices must demand both the opportunity and the resources to choose wisely. The opportunity for such choices is autonomy (italics original)(1982, p. 43).

Strike goes on to classify the resources to choose responsibly into two types. The first is information and evidence, without which responsible choice is impossible. The second is the will and ability to choose responsibly (pp. 43-4). Much of this volume has been devoted to the development of the latter, but it has been relatively mute concerning evidence and information and the role these play in autonomy and citizenship education.

Strike takes his cue from Thomas Kuhn, who, in *The Structure of Scientific Revolutions* (1970), argues that a set of concepts dominate mature sciences. This he calls a paradigm. Because theories are an attempt to account for all aspects of phenomena, paradigms set the parameters for problems to be solved and suggest the criteria for their solution. Importantly, Kuhn makes the claim that what people perceive depends not just on what is being perceived, but on the concepts with which people see. Just as an acutely astigmatic sufferer might see a bear instead of the large dog before him, the mind clouded by foggy concepts will have a difficult time making out the true nature of things. The understanding of concepts acts as corrective eyewear, which, although it does not guarantee accuracy in perception, nevertheless is a focal aid which serves to sharpen awareness.

> This, I believe, is a most profound point. *Not only does it seem that people with different concepts see different things, but it also seems that concepts are a precondition of having some experiences.* Kuhn thus seems to reverse the relations between concepts and theory as they are understood by traditional empiricism. Empiricism assumes that concepts are somehow abstracted from or constructed out of experience. Kuhn, however, argues that concepts are sometimes prerequisites to seeing. One must learn to see (italics original) (Strike, p. 31).

The idea that perception is concept-embedded means, in Strike's words, that "concepts are not merely the objects or results of thought, but the instruments of thought" (p. 32). The upshot of this revelation is that if education is seen as the passkey to the intellectual liberty required for autonomy, what we teach must go beyond the inculcation of values and the initiation into critical thinking. We will recall that open-mindedness must first be *motivated* by emotions which involve a concern for truth. It must then enlist the deliberative faculties to allow persons first to realize that alternatives exist, and that there are ways in which to assess these critically which will enable us to make more sound choices. If we take this to the logical subsequent step, persons must also have *something about which to deliberate*. The nuptials of critical thinking and substantive concepts is inevitable.

This will have a profound impact on the selection of materials. Strike points out two implications of the Kuhnian view. The first is that intellectual liberty ought to be construed as something for the initiated. This is a reminder that the intellectual liberty presupposed by autonomy is an achievement, arrived at through diligence and persistence. More importantly, though, it places side constraints on educational institutions whose business it is to encourage the growth of a moral citizenry and to prepare persons to take the reigns in making their own choices. In order to enable students to get there, schools shoulder the responsibility of ensuring that students are introduced to the dominant paradigms of the various disciplines. If students are to participate effectively in political debate and if they are to lead their lives in an autonomous fashion, students have a claim to resources which fairly present fundamental concepts. Some of this is sure to vex specific interest groups, notably religious groups, who take exception to the teaching of evolutionary theory, for example, and who denounce materials which betray even a whiff of anti-conservative or anti-capitalist thought. Yet it is difficult to imagine how students might attempt to fashion a better society without benefit of Marxist or socialist thought, adopted in such institutions as the welfare system and universal health care. Even though students may ultimately reject these as viable alternatives, the travesty of having them grope their way out of a forest without illumination from the wealth of concepts and knowledge accumulated by those who have gone before, is a failure to treat students as it is incumbent upon us to treat moral agents.

The second implication which Strike identifies is that governance of inquiry and education should reside largely with an elite who have demonstrated their mastery over the current paradigms (p. 39). In a time when the democratic struggle for authority in educative matters is reaching a pitch, such a statement is intrepid indeed. No doubt realizing this, Strike back-pedals and qualifies this claim substantially in his concluding chapter. The limits of the state's legitimate authority, he argues, are coterminus with those areas that significantly affect the state's interests. Beyond that, the schools are required to be accommodating of parental views (p. 161). I shall defer this discussion to the final chapter of this volume, where an effort will be made to clarify and balance the rights of parents and children in materials selection. The resolution of this matter will have to await that discussion. But perhaps the impatient can be mollified by a less controversial position which will carry us over the transition. Although parents may have an interest in ultimately accepting or rejecting specific materials for sundry reasons (not the least of which is that it undermines religious belief), nevertheless experts in a discipline are best equipped to at least *identify* and *conceptualize* the fundamental concepts of that discipline. Whether parents agree with exposing their children to these, and whether parents may legitimately censor these ideas from their children is a different issue.

Ironically, it is Strike who sensitizes us to the significance of the debate.

> The view I have suggested will appear undemocratic, elitist and authoritarian – descriptive terms that are hardly among the honorific vocabulary of our age. We are rather inclined to take the imagery of the marketplace of ideas as a serious metaphor for our educational institutions. We thus envisage them as smorgasbords or a flea market of intellectual wares among which free agents pick and choose as they see fit and where anyone with a novel thought is at liberty to try it out and see if it sells. But the 'flea market' rendering of the marketplace of ideas is absurd because ideas are not only the objects of thought, they are the means (p. 33-4).

Summary

In the preceding chapter, I argued that persons have a vital interest in an education for the virtue of open-mindedness. In this chapter, I have attempted to address what that education might look like. In order to be successful, an education for open-mindedness must be coordinated with cognitive and moral developmental theory, as well as a theory of reader development. Research would seem to support the conclusion that left to their own devices, children do not grow into self-controlled and self-directing adults. Indeed the research would seem to suggest that in order to achieve this autonomic end, children must be faced with some limits which govern their behaviour and guide their development. This need for positive intervention will illuminate education particularly through the primary stage and the subsequent critical and thoughtful stage.

The first stage will be marked primarily by the inculcation of beliefs which support the virtue of open-mindedness. This will be achieved primarily through modeling, both personal and vicarious through literature. The importance of inculcating belief during this stage may be crucial. We escape the charge of indoctrination because, ultimately, our goal is to *enable* children to come to hold their beliefs in an evidential fashion, and this presupposes certain dispositions which must be nurtured in childhood. While we may later come to critically assess our fundamental tenets, we often hold to these obstinately as our proprietorship is more than just intellectual – these beliefs are part of who we are and are wrapped up, sometimes inextricably, with powerful emotions. For this reason, it will be important not to be indifferent about the initial 'bag of virtues.'

Two types of processes will distinguish the education for open-mindedness in this stage: the inculcation of substantive content and the inculcation of procedural content. The former will entail the inculcation of dispositions which support a concern for truth and humility; the latter will involve the inculcation of the belief that reasons are important in achieving truth. This latter may best be accomplished by the cultivation of the sympathetic imagination.

A curriculum which embodies these attributes in the first stage will be both inclusionary and exclusionary. The need to expose children to a variety of lives to engage the sympathetic imagination will balance the need to inculcate specific beliefs sympathetic to the development of humility and a concern for truth. Conflicts will arise only when a text which serves the purposes of one prong undermines the purposes of the other. In these cases, discretion will often lead to the rejection of the work unless it can be redeemed by other justifiable objectives.

The identifying feature of the second stage will be the child's nascent capacity to reason effectively. As a result, children are no longer tied to engagement with a text, but are in a position to critically assess ideas as well. For that reason, the role of bringing students face to face with controversial ideas is two-fold. Firstly, it forces them to confront possibilities that they might never have imagined otherwise. Secondly, it provides food to pass through the digestive tract of critical thinking skills, which simultaneously provides nourishment to those cognitive skills themselves. This will raise a presumption in favour of an inclusionary curriculum policy in this second stage.

While exposure to ideas will be inclusionary, that is not to say that it will be unstructured. Indeed, the development of open-mindedness as both a personal and political virtue will require exposure to *specific* ideas which are of particular import in a liberal democracy. An inclusionary policy does not rule out the requirement that exposure to particular selections must be mandatory. Not only should texts that deal with specific controversial issues be mandated, but likewise should exposure to the fundamental concepts of disciplines. Without these fundamental concepts, one is fettered in further using these concepts as the instruments of thought in particular disciplines.

What with talk of belief inculcation and mandatory access to controversial ideas and the fundamental concepts of disciplines, the education I propose appears decidedly illiberal and undemocratic. But appearances are deceiving. An education for open-mindedness, if illiberal and undemocratic, is only procedurally so; substantively, it not only conforms to the requirements of the ideal citizen in a democratic state, but also to the liberal autonomous vision of a person. It is necessary for both of these roles. This fact not only vindicates the kind of education for which I have argued, but demands it.

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[1] See Damon, W. (1977) *The Social World of the Child.* San Francisco: Jossey-Bass
[2] For example, see Kohlberg L. (1969) Stage and Sequence: The Cognitive-Developmental Approach to Socialization. in D.A. Goslin (editor) *Handbook of Socialization Theory and Research.* Chicago: Rand McNally & Company; and

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(1970) Education for Justice: A Modern Statement of the Platonic View. in N.F. Sizer and T.R. Sizer (editors) *Moral Education.* Cambridge: Harvard University Press.

[3] In particular, Wynne, E.A. (1986) The great tradition in education: Transmitting moral values. in *Educational Leadership* 43, 4-9; also (1979) The declining character of American Youth. in *American Educator: The Professional Journal of the American Federation of Teachers*, 3, 29-32.

[4] See Hartshorne, H. and May, M.A. (1928-30) *Studies in the Nature of Character.* New York: Macmillan.

[5] See Rosenblatt, L.M. (1978) *The reader, the text, the poem: the transactional theory of the literary work.* Carbondale, Ill.: Southern Illinois University Press and Rosenblatt, L.M. (1985) The transactional theory of the literary work: implications for Research. in C.R. Cooper (editor) Researching response to literature and the teaching of literature: points of departure. Norwood, N.J.: Ablex.

[6] In support of this claim, Bogdan cites Bleich, D. (1978) *Subjective Criticism.* Baltimore, MD: John Hopkins University Press; (1986) Intersubjective reading in *New Literary History*, 27, 401-421; Fish, S. (1970) Literature in the reader: affective stylistics in *New Literary History*, 2, 123-162; (1980) *Is there a text in this class? The authority of interpretive communities.* Cambridge, MA: Harvard University Press; Iser, W. (1978) *The act of reading: a theory of aesthetic response.* Baltimore, MD: John Hopkins University Press; (1980) Texts and readers in *Discourse Processes* , 3, 327-343; Tompkins, J.P. (editor) (1980) *Reader-response criticism: from formalism to post-structuralism*. Baltimore, MD: John Hopkins University Press; and Rosenblatt, L. (1978) and 1985) Op cit.

[7] Appleyard refers to Moshman, D. and Niemark, E. (1982) Four aspects of adolescent cognitive development. in T.M. Field *Review of human development.* New York: Wiley, for a discussion of the adolescent as developing logician, scientist, philosopher and artist.

[8] See Holland, N.N. (1968) *The Dynamics of Literary Response.* New York: Oxford University Press.

[9] Thayer, L.O. and Pranko, N.H. (1959) Factors affecting conceptual perception in reading. *Journal of Genetic Psychology*, 61, 51-59.

[10] Meckel, H. (1946) An exploratory study of the responses of adolescent pupils to situations in a novel. Ph.D. Dissertation. University of Chicago.

CHAPTER SIX

THE MORAL RIGHTS OF CHILDREN AND PARENTS

The Moral Rights of Children

The foregoing chapters form the basis for a normative theory of materials access and selection. This theory has at its base an understanding of autonomy as essential to civic virtue, and as an ideal toward which schools should seek to enable students to strive in their own private lives. Key to this enterprise is the development of the virtue of open-mindedness, which commences with some form of belief inculcation, but which ultimately devolves into a handing over of the reins to students and permitting them broad access to ideas. All of this is valuable insofar as a clear understanding of what is at stake is the necessary impetus to any prescribed change. While normative theory ought to govern change, the tools we use to effect it may well influence the degree of success with which we will meet.

We have reached the point in our social and political evolution where rights-based theories have captured much of the attention in moral discourse. Rights have become the modern weapon of choice in moral and political conflict. They have become so handy, in fact, that some question whether we resort to rights too quickly as a means of recourse. The availability of such a weapon may discourage other possibilities for conflict resolution. Furthermore, its readiness may prompt resort to rights at the slightest affront.

The influx of rights-based theories is matched by a surge in rights claims both in terms of a seeming willingness to resort to rights talk to express one's interests and in the appropriation of more and more of the transactions in our lives as being reducible to rights talk. The perceived inflation of the currency of rights by its exponential proliferation has caused concern that the inevitable outcome will be a widespread devaluation of rights. Indeed, it has been suggested that rights talk does not lend itself to the satisfactory resolution of problems dealing with children's interests and their possible conflict with parental interests at all (Louden, 1983; Hardwig, 1984).

I shall leave to another day discussion on the relative merits of rights versus other possible resolutions. I shall assume, instead, that an examination of rights is a fruitful exercise. Given the nature of the interests we are seeking to protect, it is my position that there is little danger that we would be contributing to the trivialization of rights. Indeed, my contention is that an education for the virtue of open-mindedness is a *vital* interest of all persons. Furthermore, there would appear to be a prima facie case for the appropriateness of rights talk where children are concerned. The fact that children are severely impaired in their ability to defend their own interests would seem to require a more transparent defense of those interests as accorded by the state. If rights are reserved for interests of significant import which ought not to be infringed, the fact that children are essentially mute with respect to these would seem to call for *as broad a protection as possible* which might then be tempered in individual cases. A scheme supporting only feeble protection would effectively cap responsibilities and duties and make it very difficult for children or others acting on their behalf, to argue that a pressing interest demands greater protection. Rights ensure that interests of vital importance are not left to the vagaries of institutions, bureaucrats, and even parents.

The remainder of this dissertation will be devoted to a discussion of rights. I will commence by exploring rights theory to determine whether a case can be made to say that children have a moral right to an education for open-mindedness. Given the conflictual nature of rights, this will be followed by an examination of the moral rights of parents to direct the education of their children. The next chapter will transport this theoretical argument into the realm of legal rights firstly with a view to determining how the courts have recognized the present rights, and secondly, whether a case can be made for a child's right to an education for open-mindedness within the existing Canadian legal structure.

The Intelligibility of Moral Rights

As much as talk of rights has insinuated itself into public and even private parlance, the idea of rights and the normative constraints they place on others is not at all settled. What exactly does it mean to say I have a right to something? Richard B. Brandt (1959) states the correlativity thesis of rights when he suggests that a right is the correlative of a duty owed to some second party. The difference between A's right against B and B's duty to A is mainly the difference between the active and passive voice.

At first blush, the correlativity thesis has some merit, as it is indisputable that duties are closely intertwined with conceptions of rights. The exaggeration is that *every* right must entail a duty and *every* duty will entail a right. Joel Feinberg (1970) suggests the example of duties of charity which do not correspond to an identifiable right (p. 244). The converse is rendered suspect by reference to Wesley Hohfeld's classification of rights which recognizes the traditional duties as claims, but which also generously interprets the kinds of obligations we owe to rights-holders (1919). Hohfeld identifies four types of rights. A legal *claim right* corresponds to a legal duty upon some second party. A *liberty* to do X consists in the absence of other people's claim that X not be done by the agent. A legal *power* to do X is defined by a person's legal competence to perform an act which will create certain legal consequences for a second party. An *immunity* from X is matched by the lack of power on the part of others to do X. The correlative of an immunity is a disability (p. 71).

I shall defer, for the moment, an inquiry into the nature of a duty and its implications in rights discourse. Presently, it will suffice to extract some general principles which will guide the remainder of this discussion. Firstly, it makes no sense to talk of rights without some identifiable right-holder(s). Secondly, the import of a right is to place normative constraints upon others which demand some form of compliance or forbearance. These general parameters provide a framework. The more interesting work will be how we will deal with the details which will enable rights-holders to flex prescriptive muscle.

I shall be arguing, later in this chapter, for children's rights in what I believe to be a novel context. Traditionally, children have been disenfranchised as rights-holders, and have been seen to be recipients of goods largely as a function of largesse as opposed to entitlement. It will be important, then, to root out perceived impediments and to dispatch these if we are to argue children's rights with any force. The first of these impediments is not restricted exclusively to children, but children are inordinately impacted as they do not wield the influence adults do to enforce their will and to instigate legal change.

It is clear that the codification of children's rights in legislation is a relatively recent phenomenon. The momentum that has been gathered has reached a good clip only within the last several decades. Yet the heightened awareness of children's issues has not achieved parity with other rights-related issues, such as racial, gender, and sexual orientation discrimination. This is due at least in part to an ambivalence about the status of children – whether they ought to be subject to paternalist policies, or whether they ought to be full-fledged rights-holders. Because of this tension, without legislative intervention or the constitutional nod, children are left in a limbo between the worlds of persons who are accorded right-bearing status, and that of inanimate objects. I am not suggesting that anyone considers children to be inanimate objects, but the failure to properly conceptualize that limbo which children occupy risks allowing them be *treated* as inanimate objects in terms of rights. It would be useful, in this confusion, to examine the *source* of rights to determine whether there is anything in it which might disqualify children from holding rights.

Jeremy Bentham was adamant that there can be no rights without duties; there can be no duties without laws; therefore there can be no rights without laws (1952-54, p. 334). By this thinking, he dismisses the possibility of 'natural rights' or rights that exist absent some state-sanctioned mechanisms to uphold them as a logical absurdity. Rex Martin and James W. Nickel survey the literature relating to rights between the period 1963 to 1978, and note that, during the period of their survey, the Benthamite view was rarely defended because of its wide acceptance. It brings to the fore the uneasiness surrounding the issue of moral rights and conventional rights and how the two interact.

The thesis of proponents of moral rights[1] is that rights exist independently of conventional systems, and derive their justification from a moral objective standard. The challenge to these theories is to provide existence conditions for the duties they affirm. L.W. Sumner (1987) attempts a reconciliation by arguing that a moral duty is not just a conventional duty, but a morally justified conventional duty. "We establish the existence of the moral right," he states, "by showing that the conventional right is justified, and not the other way around" (p. 149). He contends that from a practical point of view, "what matters most is that we be able to distinguish between those conventional rights which are morally justified from those which are not" (p. 149). He uses as an example the case that a claim to the "moral right to worship freely is logically equivalent to the claim that the policy of conferring the corresponding conventional right on us is morally justified. The former," he argues, "cannot constitute the justification for, or the ground of, the latter. Indeed, the order of discovery is just the reverse" (p. 149).

But it is by no means intuitive that the justification of extant conventional rights is the sole, or even primary work to be done by moral rights. While Sumner concedes that a substantive moral theory may take the shape of an argument which starts from that theory and which ends by supporting the policy of conferring the right in question, such an explication does not make adequate room for the proactive role of moral reasons in shaping conventional rights. It does not distinguish properly between moral reasons which are simply good reasons to act, and no more, and moral reasons which are *sufficient grounds to justify compelling compliance* by the state. Sumner would surely agree that conventional rights do not spontaneously evolve from the primordial muck in a completely random fashion. Their genesis is manipulated by the force of *moral reasons*. These reasons are not merely a post-evolutionary check on the state of legal organisms to determine which legislative species ought to be annihilated and which retained for the benefit of persons. Rather, these moral reasons must play an active role in the pre-enactment stage of law if we are to have any success in ensuring that our laws are indeed *moral* laws. Further, these reasons are sufficiently persuasive to warrant the establishment of an enforceable *duty*.

My second reservation about Sumner's account is related. It seems to me that his definition of an existing legal right is not properly explained. It would seem to suppose a right as either being obviously in existence or not. But consider the problem of enshrined constitutional principles which are notoriously vague. If we accept Sumner's argument, then only those conventional rights which are supported by solid moral reasons can be considered to be moral rights. This presumes a well-articulated duty and a well-articulated moral defence for any given right because insisting that rights be clothed in conventional garb and spelling out duties is precisely the reason for insisting on conventional rights, in order that neither the state nor other citizens be bound by elusive and abstract rights. Recall our earlier distinction between the three dimensions of a right: its content, scope and strength. The strength of a right has been completely specified when its weight has been given relative to every sort of consideration with which it might compete.

> A right is fully determinate only when its content, scope and strength have been fully specified. A set of rights is fully determinate only when all its members are fully determinate. Only a set of fully determinate basic rights can provide a fully determinate standard of authenticity for rights. The best case, therefore, is that a theory of rights will justify some unique set of fully determinate rights. Doubtless this ideal of perfect determinacy, even if attainable in principle, is unattainable in practice. We should therefore settle for any theory which can justify some set of reasonably determinate rights. If a natural rights theory is to rebut Bentham's charge of arbitrariness, it must be capable of at least this much (Sumner, pp. 124-5).

Sumner refers to Bentham's rejection of the sweeping rights (such as the right to liberty) which appeared in some of the rights declarations of his time. If everyone possesses a right to liberty which is unlimited and indefeasible, government could not impose any duties at all, for these necessarily would infringe the right to liberty. Once we succumb to prioritizing rights in cases of conflict, he suggests, those rights are no longer absolute nor indefeasible and it would mean that those other conditions which would justify the infringement are morally basic rather than the rights themselves (Sumner, p. 121). Sumner points to this as a hurdle for natural rights theories to overcome, but this is equally problematic for constitutional rights in the present day, and many societies appear to tolerate the ambiguity remarkably well. Indeed, if law is to be responsive to changing social conditions and concerns, this kind of legal laxity is necessary.

Consider that in recent times, the right to liberty has been held to include the right to direct the education of one's child, the right to an abortion, and the broad right to equality has been held to place positive obligations on provinces to include in human rights legislation sexual orientation as a prohibited ground of discrimination. Canada's highest court will soon be asked to consider whether the right to equality implies the right of homosexual couples to be treated as a common law couple for the purposes of various social policies including taxation, pension benefits and so on. Courts will even be asked to determine whether homosexuals have a right to be legally married under the umbrella of the right to equality. These specific rights, while ostensibly given authority under the more general, broad constitutional rights, appear to fall within a grey area. Yes, they are technically conventional rights, but they elude being characterized in this way. They are not determinate and, indeed, may be virtually invisible until they receive the kiss from the court which magically brings them to life in a certain case. Furthermore, it is unclear to me why moral rights must be premised upon a claim to being absolute and indefeasible any more than conventional rights are. Just as the latter can be upset by a more urgent countervailing legal interest, it seems to me entirely coherent that certain moral reasons may cede in the face of a more powerful moral argument. Sumner does not deal with these slumbering rights, but their existence suggests a much closer relationship between conventional rights and moral reasons than many would admit.

Confronted by these constitutional rights, Sumner is put into the uncomfortable position of saying that the broad umbrella rights are not conventional rights at all (which would seem to be an untenable position), or that conventional rights can be as indeterminate as moral rights are accused of being, and that the specific judge-made laws are *born* of moral reasons which do not merely justify the existence of extant constitutional rights, but actually *call them into existence*. Sumner's argument depends upon reasonably well-defined and circumscribed rights and duties in the law;

if these are not well-articulated, it undermines at least part of the rationale for differentiating between conventional rights and moral rights in the first place.

The problem is that, by their nature, many constitutional rights as they appear in the *Charter*, the American Constitution, and other like documents, do not meet this standard of precision. Indeed, they were drafted vaguely intentionally so as to be broad enough to encompass situations which could not have been foreseen at that moment in history. Take, for example the right to liberty in section 7 of the *Charter*. Such a right is so broad as to be virtually meaningless except in the specific liberty-rights which subsequently flow from judicial interpretation. To suggest that the right to liberty includes the freedom to murder a neighbour because of one's dislike of him would be repugnant. This example highlights two things. Firstly, the black letter of the law is insufficient to imbue meaning to a given constitutional "right" – it requires the nexus with moral reasons to give it shape. Secondly, it is only the *specific content of that right* which will dispel the vagueness which is the bane of moral rights to those, like Sumner, with a Benthamite penchant.

Nevertheless, Sumner has some valid concerns: a moral right 'in the air' is meaningless. But the mere fact that a right has not been captured by legal processes does not mean that no normative significance attaches to it. If we can make an argument for the prescriptive possibilities of moral reasons, then this will allay the main concern of those who have difficulty acknowledging 'moral rights.' Secondly, we must consider why these moral *reasons* should metamorphose into moral *rights*.

We often hear assertions such as "I have a right to voice my opinion," or "I have a right to discipline my child," or "I have a right to be treated fairly." On occasion, this is reflective of an understanding of legal principles and remedies. But more often than not, it expresses an implicit understanding of what it means to be a person and an expectation of how persons ought to be treated and what is their due. This form of expression has become so prevalent, in fact, that the idea of moral rights has, in the vernacular, supplanted or at least elbowed aside the purely legalistic understanding of the term. Shall we shake our heads, insist that people are getting it all wrong, and demand that they expunge such utterances from their vocabulary? I think this would be a mistake.

The importance of viewing someone as a bearer of a right is not merely rhetorical. Rights are things which are recognized and ascribed, not because the law has fortuitously said it is so, but *because they are seen to reflect some over-riding interest in the life of an agent and because it is felt that some form of normative constraints ought to flow therefrom*. One may ask why we are not content simply to acknowledge an interest *tout court* and to refrain from conscripting rights where no conventional recognition has been made. The reason is this: the language of interests is largely a descriptive one and as such is denuded of much of its moral force. Some interests not only reflect states which are preferable to other states, but are of *vital importance to personhood*. Moral rights recognize these interests of vital importance *and purport to regulate how we ought to act in view of those vital interests*. It is my view that discussion of interests alone will not suffice to bring about the kind of revolutionary changes often required of law. To acknowledge an interest is lip service; to acknowledge a moral right is to acknowledge that the interest is a vital interest, such that it ought to defeat at least some other claims, and that the right ought quite properly to require action or forbearance on the part of others, *as a matter of duty* and not largesse. Moral rights have purchasing power.

The evolution of our language has upped the ante, as it were. This does not mean that we ought to capitulate merely because everyone is clambering for rights. But moral reasons are not just a check on the justifiability of laws as Sumner suggests. They can, if the interests upon which they rely are vital, form the basis of moral rights which no existing law or custom embodies. These recognize the importance of those interests and define how we ought to act. Stanley Benn writes:

> All rational persons stand in the same position to condemn inhumanity, whoever is the victim. By contrast, someone whose rights are infringed has in addition a justifiable grievance and grounds for resentment that onlookers do not have. For a wrong, an injury, constitutes a failure in justice, not in mercy or benevolence; it is a failure to render what is due, and not just a failure to do what it would be good to do for the sake of best consequences (1988, p. 238).

Moreover, moral rights are the impetus to shape conventional rights which provide the force of the state in exacting compliance. If they cannot force compliance by the sanction of the state, they are at least the *reason* for demanding that the state give such recognition through its legislative or judicial processes. A failure to do so properly invites the censure of citizens, as it is a failure in justice.

How does this fit within the context of my argument as a whole? It is my contention that, being possessed of the virtue of open-mindedness is crucial to the development of personal autonomy and of the capacity to discharge the civic duties required of the burdens of judgment. Being a good citizen in the sense of being able to meaningfully participate in the political process of a liberal democracy, and of respecting the rights of one's fellow citizens is not only an interest, it is a vital interest.

Likewise accessibility to the autonomous life is a vital interest in that it captures what it means to lead a human life – to direct one's own life, making choices for oneself, and having the abilities and dispositions necessary to make sound choices. These interests are *so* important, in fact, that virtually everyone would concede that these interests ought to generate some side-constraints on other members of the community. I conclude that there exists a moral right to an education for open-mindedness, and that this moral right is the impetus to ensure that the moral right be enshrined in conventional legal rights.

Children as Rights-Holders

Much philosophical debate has centred on the issue of what characteristics qualify one to be a right-holder. The power of waiver as a distinguishing characteristic of rights is made by H.L.A. Hart (1984). Hart writes:

> If common usage sanctions talk of the rights of animals or babies, it makes an idle use of the expression 'a right,' which will confuse the situation with other different moral situations where the expression 'a right' has specific force (p. 75).

Joseph Raz (1984a; 1984b), on the other hand, contends that a duty is owed to an individual or class of individuals when it is justified by its role serving some interest of those individuals. Raz's argument ostensibly ties the conferring of rights to the welfare of individuals. This gathers children into the fold of rights-bearers, but leads to the possibility that individuals can have rights over which they have no control and which nonetheless impose duties on others.

Sumner observes that proponents of the choice thesis claim that it alone can make sense of rights being exercised, whereas the welfare thesis leads to the conclusion that, because they are beyond our normative control, they are unexercisable. Sumner opts for the choice model, arguing that recognizing the central importance of exercisability preserves the character of rights. His view is that the choice conception is the preferable one as it recognizes that autonomy is sufficiently important to be safeguarded by a distinctive normative concept. Adopting the interest model would contribute to the erosion of respect for autonomy (p. 98).

> The basic difference between the two conceptions lies in the normative function which they assign to rights. On the interest conception, that function is the protection of some aspect or other of the right-holder's welfare. While this function might be most efficiently served in some cases by assuring the right-holder's liberty or normative control, in other cases it might most efficiently be served by restricting that liberty or withholding that control. Thus, for example, certain basic interests of individuals might best be served by conferring on them claims to the protective services of others which they have no power to alienate, whether temporarily (by waiving them) or permanently (by relinquishing them). Since the interest conception will count such claims as rights, there are no internal connections on this model between rights and such values as autonomy, self-determination and freedom. These connections are of course affirmed by the choice conception, since on that conception rights exist precisely in order to protect and promote these values. Thus on the choice conception, a claim which cannot be alienated in any way, thus one which is beyond the holder's normative control, cannot count as a right (Sumner, p. 97).

As Sumner concedes, this conception threatens to disqualify some rights-holders who are generally counted as such, like children (p. 96). He suggests that the remedy in those cases in which a duty has the function of protecting welfare is to acknowledge that a relational duty is owed to that third party, outside of the language of rights (p. 100). This creates the possibility of duties being owed without a corresponding right.

In essence, the choice thesis stands for the proposition that children (particularly young ones) do not have rights in the truest sense of the word. Given the concessions that Sumner makes, can we abide such a concept of rights, or do we place children in jeopardy by relying upon duties without rights? I share Neil MacCormick's (1982) view that the choice theory of rights is an unsatisfactory one. He argues, in fact, that children's rights are a good test case for theories of rights precisely because the concept of children's rights is difficult to square with some theories (p. 154).

It is unquestionable that autonomy should play a critical role in defining rights, and the exercise of paternalism toward an adult who simply does not want the paternalism is, in general, repugnant. But I think that Sumner illicitly ties autonomy to the choice model while rejecting the welfare model as being destructive of autonomy. The dichotomy is typically seen as the difference between the function of rights as protecting choice or welfare. But this is misleading, particularly when we speak of education. A paradox exists in that the *reason* choice is protected is because *autonomy* is highly prized. But a child's interest in being educated for open-mindedness, in particular, is perhaps even more intimately connected to autonomy than is an adult's choice about what to have for dinner. At best, the two are separated by the particular moment in the life of the person. To claim that the one rests upon autonomy and the other upon welfare is false. I think that Sumner makes the mistake of viewing liberty and autonomy in a negative sense whereas a positive conception of liberty is not only defensible, but fills in the gap into which children have fallen. If we accept Sumner's point that children do not have rights because they cannot benefit from the liberty which is so highly prized, the implication is that children do not have an interest in liberty as profound as the interest of any adult. This is clearly not so, but Sumner's theory cannot adequately fill in the lacuna.

Isaiah Berlin in his seminal work *Four Essays on Liberty* (1964) discusses the distinction between positive and negative liberty. Negative liberty, he argues, is essentially that area within which the individual is left to do what he is able to do or be without interference from other persons. Adults are perceived as being 'in the maturity of their faculties' and capable of self-government and of bearing the consequences of their actions. It makes sense that if we value the liberty of adults, we must respect it by permitting adults a broad range of unfettered movement.

But I think Sumner makes the same mistake as John Rawls in dealing with liberty. In fleshing out his influential theory of justice, Rawls places liberty at the apex of his lexical hierarchy. Rawls is correct in pointing out that if we are to take seriously the idea of self-governed lives, we cannot ignore the importance of freedom. Regardless of the position in society that individuals will occupy, individuals would agree, from behind the veil of ignorance, to certain things which are prerequisites to leading a good life. As Waldron states,

> There is something like *pursuing a conception of the good life* that all people, even those with the most diverse commitments, can be said to be engaged in…although people do not share one another's ideals, they can at least abstract from their experience a sense of *what it is like to be committed to an ideal of the good life* (italics original)(1987, p. 145).

Not only does Rawls place liberty at the apex, but his interpretation of liberty is decidedly narrow by confining it to that range of negative liberty circumscribed by political participation.

> The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty, the value of individuals of the rights that the first principle defines…Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines (1971, p 204).

Rawls classifies poverty and ignorance, for example, not as constraints definitive of liberty, but as things affecting the worth of liberty, the value to individuals of the rights that the first principle defines. But societies exist as means to the self-directed pursuit of the good life by individuals. It would seem, then, that the eradication of poverty and ignorance to the extent that they have an unjustifiably debilitating effect on the ability to pursue the good life is a *sine qua non* to meaningful political rights.

Liberty, in some sense, is required in order to pursue a conception of the good life. But two closely intertwined problems emerge from Rawls' theory. The first is that the conception of liberty which he espouses is a narrow one, particularly as it relates to children. This relates to the further problem of the lexical priority he accords to this notion of negative freedom. Both stem, I think, from a failure to access the empowering concept of autonomy in order to find a fitting role for liberty.

I contend that the most pressing need of members of a society is not necessarily to maximize negative liberty. Mill argues that a society must have arrived at a certain state from which it can profit from liberty. Likewise, no child is born with the most pressing need to be free, but instead, to be fed, clothed, nurtured emotionally, as McCormick suggests, and to be educated to the point where one can meaningfully participate as a member of a polity. To be sure, we cannot completely ignore negative liberty as, all things being equal, leading our own lives from the inside is ultimately important to leading a good life. But in terms of developmental priorities, Rawls' hierarchy is upside down. And Sumner's argument that only cases where this kind of liberty is implicated can generate rights and that it is this kind of liberty which is most important (for rights must be seen to protect the *most* important interests or they are meaningless) falls into the same trap.

The *point* of liberty is to enable us to lead good lives as persons. It equips us as individuals to hew good lives. But things are much more complex than to suggest that the maximization of negative liberty will inevitably conduce to a good life. It is not at all intuitive that, left to their own devices and accorded the liberty to do as they please, children would be successful in achieving good, satisfying lives for themselves. Indeed, the discussion of the empirical evidence on this point in chapter five would seem to refute that conclusion. If the capacity to lead self-determined lives is our governing principle, then the place and content of 'liberty' needs to be rethought, particularly as it relates to children.

We can perhaps forgive Rawls because he is surely operating from an assumption that the individuals of whom he speaks are adults who have already been educated to an adequate level. The mischief occasioned by adopting Rawls' position, as Sumner seems to have done, is that children are left without rights although their interests in being able to properly exercise liberty in the future are as profound as any adult's interest in liberty. Children's interests in autonomy and liberty are distinctive by virtue of their importance in making liberty a *meaningful* idea, and in making meaningful the idea of the pursuit of a conception of the good life. The justification of liberty is in its instrumental service to autonomy, and autonomy cannot thrive in conditions which do not support the development of certain dispositions such as the virtue of open-mindedness. Negative liberty, then, depends upon having allowed positive liberty to flourish during childhood. How can it plausibly be argued, then, that the negative liberty guarded for adults will merit the protection of rights while the more fundamental positive liberty needed for children does not qualify?

Kymlicka (1990) observes that "on a teleological liberty principle, the goal is not to respect people for whom certain liberties are needed or wanted, but to respect liberty, for whom certain people may or may not be useful contributors" (pp. 135-6). Kymlicka contends that not all liberties are created equal and proposes the idea of 'purposive freedom' where the value of a particular liberty depends upon the importance of that freedom to us, given our interests and purposes. If we consider what makes liberties important to us, "then freedom no longer systematically competes with other values like dignity or material security, or autonomy, for these are the very values which make particular liberties important" (pp. 144-5). *It is because the right to liberty is justified by other interests* that we are able to say that the freedom to marry whom one chooses, for example, is a more important liberty than the freedom to spit on sidewalks.

Thus autonomy provides the valuational structure for liberty. The value of a particular liberty is proportionate to the extent that it is necessary to secure those conditions necessary to leading self-determined lives, not simply to be 'free,' and the value of liberty must be elucidated in this context. Raz alludes to this idea.

> Rights protect not their interests generally, but only their interest in freedom. The capacity to be free, to decide freely the course of their own lives, is what makes a person. Respecting people as people consists in giving due weight to their interest in having and exercising that capacity. On this view, respect for people consists in respecting their interest to enjoy personal autonomy (1986, p. 190).

On Raz's view, the ascription of rights based on interests is entirely consistent with respect for the autonomy of persons, and more than that, the *reason* why others are held to duties is out of respect for persons' *interest* in autonomy. This means it is perfectly plausible that children's interests will form the basis of rights which will precipitate duties from others. I need not tackle the question of whether rights should precipitate duties in all cases where interests are concerned. It will suffice for me to show that at least *some* interests of children are critical enough to the development of autonomy, that, even if they (or anyone else acting on their behalf) cannot waive the paternalistic performance of these duties, they must qualify as rights. This seems to me to adequately respond to the concern expressed by Hart and Sumner that rights must be linked to autonomy and liberty to retain the normative force of rights language for children in at least some areas occupying the middle ground.

One might venture that not much rests on the semantics of whether we ascribe rights with duties, or whether we recognize duties without rights as the correlative of an interest, as Sumner suggests. I think this is a confused, and indeed dangerous, position to take. To say that we may owe children duties without rights not only is to devalue the interests children have, but also is an invitation to incursions upon these interests. MacCormick claims that "there is a significant difference between asserting that every child ought to be cared for, nurtured, and if possible, loved, and asserting that every child has a right to care, nurture and love" (p. 159). He brings the difference into relief by showing that there are statements "which could intelligibly be advanced as justifications for the former proposition but which could not be intelligibly advanced in justification of the latter" (p. 159).

> For example, along the lines of Swift's *Modest Proposal*, one could suggest as a reason why children ought to be cared for, nurtured and loved, that that would be the best way of letting them grow into plump contented creatures fit to enhance the national diet. Or again, one could argue that a healthy society requires healthy and well-nurtured children who will grow up into contented and well-adjusted adults who will contribute to the GNP and not to be a charge on the welfare facilities or the prison service (p. 159).

This crucially neglects that some needs and interests are of such importance that to fail to meet them would be to commit a wrong to the individual, regardless of ulterior advantages in doing so (MacCormick, p. 160). If I am correct in saying that moral rights play a pivotal role as the impetus to contour legal rights, then it will be important to recognize moral rights for children as a precursor to demarcating moral and legal duties. A failure to abide by these rights can draw both moral and legal censure. But a failure to treat these interests as rights at all leaves children in a precarious moral and legal position in terms of compelling remedies, should we simply decide that today, we will ignore children's interests. The failure to recognize children as moral rights-holders has serious implications. As I argued in the previous section, moral rights are intimately involved in the development of legal rights. If the issue is merely one of semantics, it is more appropriate to recognize that children have true moral and legal rights because it maintains the form of language currently in use in the legal community. If we are using moral rights to justify the development of legal rights, consistency in language between the moral world and the legal world is appropriate. It would be strange to permit a child to come before the courts, claiming a right to an education for open-mindedness under certain constitutional principles while insisting we may owe her duties without according her the moral right. The rift between legal and moral language would have the child fall into the crevice. I suggest an alignment.

The value of rights, I think, lies in their design as a means to encapsulate the vital interests of persons who are, or will be, autonomous agents who are deserving of respect. I am defending in this, the principle of respect for persons as a fundamental and ultimate moral principle, as well as a fundamental parity between persons and persons-to-be vis-à-vis rights even though they may be at different life stages. The justification for this is that, regardless of whether the agent presently engages in autonomous decision-making or not, *the interest in autonomy remains static*. The exercisability of rights, then, is a noteworthy concern, but it is peripheral to the core reason for rights. In childhood, this respect for (anticipated) autonomy will prescribe non-exercisable rights, and in adulthood, exercisable rights. The fact that we may have to treat children paternalistically in providing them with an education for open-mindedness will not be an impediment to the ascription of rights.

The Nature of the Duty Owed to Children in Respect of an Education for Open-Mindedness

The final objection which must be met concerns the difficulty in recognizing rights which do not easily lend themselves to corresponding, identifiable duties attaching to identifiable parties. Indeed, without stipulating duties and second parties, enforcement of rights becomes a difficult if not impossible task. Clearly, the claim to an education for open-mindedness will make demands which will entail the positive action of a large sector of society and at least the forbearance of the remainder. Rights without some form of duties are impotent, and so a child's right to an education for open-mindedness will have little force if the corresponding duties cannot be reasonably circumscribed. We will recall Hohfeld's argument that rights can be constituted by claims, liberties, powers or immunities. He contends that a right 'in the strictest sense' is the correlative of a duty owed to some second party (pp. 36,38). The idea persists that it is absurd to assert the existence of a right while allowing that no one is under any duty to ensure that the right is respected. Indeed part of the skittishness towards moral rights stems from a concern about how we can have rights without duties.

In addressing this objection, let us take as our starting point a statement from Raz.

> It is wrong to translate statements of rights into statements of 'the corresponding duties.' A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding the other person to have a duty…[T]here is no closed list of duties which correspond to that right. The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties based on the old right…This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function in practical

> thought. Unfortunately, most if not all formulations of the correlativity thesis disregard the dynamic aspect of rights. They all assume that a right can be exhaustively stated by stating those duties which it has already established (1986, p. 171).

What is noteworthy about Raz's description is that rights and duties are amorphous and achieve their shape at any given moment as they are plied by the governing interest and countervailing interests. Thus Raz is led to say:

> The…point to bear in mind is that the implications of a right, such as the right to education and the duties it grounds, depend on additional premisses and these can not in principle be wholly determined in advance…Because of this, rights can be ascribed a dynamic character. They are not merely the grounds of existing duties, with changing circumstances they can generate new duties (1986, pp. 185-6).

But even Raz is skeptical of certain rights which purport to impose duties on a vast scale.

> A right to autonomy can be had only if the interest of the right-holder justifies holding members of society at large to be duty-bound to him to provide him with the social environment necessary to give him a chance to have an autonomous life. Assuming that the interest of one person cannot justify holding so many to be subject to potentially burdensome duties, regarding such fundamental aspects of their lives, it follows that there is no right to personal autonomy. Personal autonomy may be a moral ideal to be pursued by, among others, political action. It serves to justify and to reinforce various derivative rights which defend and promote limited aspects of autonomy. But, in itself, in its full generality, it transcends what any individual has a right to (1986, p. 247).

How does the notion of duties interpolate itself into the proposed right to an education for open-mindedness? Historically, the purview of duties has been regarded in a remarkably narrow and, I would argue, legalistic way. This makes sense if we consider that a balmy climate receptive to the recognition of rights has followed a very long, severe winter. Whether the parsimonious recognition of rights precipitated nominal duties, or whether the circumscribed duties were influential in limiting rights recognition is a chicken and egg story. I suspect that the two are conjoined and are moved primarily by the forces of culture. In any case, a social revolution has taken place which has seen an increased awareness of rights and duties. As monarchies have been supplanted by democratic governments, the claims of individuals and groups against their neighbours and the state have demanded that we redefine our responsibilities to our fellow human beings, both *qua* individuals and as a society. The ambit of duties, together with the ambit of recognized rights, is burgeoning. At the same time, we must keep in mind the caveat that 'rights which do not guide anyone's behaviour are no rights at all.'

The first factor that ought to ease our minds about the perception of having all of society orchestrated for the right of one child, is that this is a misleading construct. Whether we wish to call it a group right, or a right held individually by a large group of persons, the view that persons have a right to some form of education is widely held. The legal basis for this will be discussed in greater detail in the concluding chapter. Not only is the right held by large numbers of children at any given time, but *every person must pass through this stage*. In other words, it is a right which is held by everyone at one time or another, making it hardly something wielded by the one, or even the few, against the many.

Secondly, although society generally would be implicated in observing this right, the corresponding responsibilities reflect a 'bundle' of duties. Teachers would have the most significant positive duties in terms of actually delivering an education for open-mindedness. Administrators and those involved generally in curriculum design will need to meet certain positive expectations. But, interestingly, these are not strangers whom we would pluck off the street and censure for failing to comply with children's rights. Rather, they are individuals who, by choice of profession, have voluntarily assumed the responsibility of educating their students. Of course, an education for open-mindedness will require more than just a thoughtfully designed curriculum which ultimately provides access to ideas. It will depend upon resources such as schools with good libraries, good teachers, lunch programs, available transportation and so on. Indeed, the threats to open-mindedness are broader than just the curriculum. But most of these supportive structures are already in place. Given that the right to education has been recognized in our society at least to the extent that it is compulsory, claiming a right to an education for open-mindedness entails relatively little more in terms of pedagogical responsibilities. It need not require added expenditures on materials, nor the hiring of additional staff, nor additional tangible burden on citizens. What it will require is a different attitude to learning objectives on the part of some (and not all) teachers, principals, school boards, and a general deference to the child's right to an education for open-mindedness.

Thirdly, Raz's example of the right to autonomy raises important issues about the vagueness of a right. How could any individual or society possibly conform to a general right to autonomy in all its myriad permutations? The nature of any right as emerging from morally fundamental interests makes it difficult for the specific duties that correspond to the interest to be obvious at all times. Such a right would be notoriously vague, something which, in itself, may cause injustice if we were to hold people to such slippery duties. However, this is distinguishable from a right to an education for open-mindedness. The salient interests of the relevant stakeholders in the enterprise of education are relatively well-known: students, teachers and educational experts, parents, and even society-at-large. The enterprise itself is reasonably circumscribed.

Perhaps the most persuasive argument to be made is that, unlike many other rights, the right to an education for open-mindedness pulls double duty, so to speak. The argument made in chapters two and three examined access to the autonomous life as a vital interest of persons. It was also discussed that autonomy is also an interest we hold in our roles as citizens. Thus, I, as a member of society owe a duty to others to at least permit them to be educated into the virtue of open-mindedness out of respect for their status as both *persons* and *citizens*. Furthermore, I, as a person and citizen, may claim the right to be educated for open-mindedness, but I *concomitantly* owe the same duty to my fellow citizens. That is, not only must I respect *their* right to be educated for open-mindedness, but it is also *my duty as a fellow citizen in a liberal democracy to undergo an education for open-mindedness*. A liberal democratic society would wither under the heat of unabated intolerance, bigotry, bias and prejudice. Raz makes a thought-provoking argument with respect to the role of rights.

> [The role of the typical liberal rights] is not in articulating fundamental moral or political principles, nor in the protection of individualistic personal interests of absolute weight. It is to maintain and protect the fundamental moral and political culture of a community through specific institutional arrangements or political conventions (1986, p. 245).

We need not embrace his suggestion unreservedly to acknowledge that rights do indeed play a pivotal role in protecting our liberal democratic culture. The idea of the maintenance of our cultural fabric reinforces the case for an education for open-mindedness which itself rests upon the respect for autonomy of persons and citizens.

Raz's concern about holding a society at large to a duty for the right of one is thus mitigated. "When we call anything a perfect right," Mill states, "we mean that he has a valid claim on society to protect him in the interest of it, either by force of law, or by that of *education and opinion*" (emphasis added) (1969, p. 250). Although compliance with this particular duty entails something as unorthodox as exposing oneself to an education for open-mindedness, there is no bar to it, provided compliance can be sufficiently circumscribed. I would suggest that the argument and recommendations made in the previous two chapters suggest that this can indeed be accomplished in a minimally invasive manner.

Let us recapitulate before moving on to discuss parental rights. In the preceding chapters, we identified a vital interest in an education for the virtue of open-mindedness, which will be comprised initially of the inculcation of beliefs fundamental to open-mindedness (i.e. humility, a concern for truth and a respect for the role of reasons). That stage will be perfected by subsequent exposure to a broad range of ideas to engage critical thinking skills as well as an awareness of the diversity of possibilities and alternatives which are extant in making choices. In this chapter, I argued that this vital interest is of such significance that it qualifies as a moral right to an education for open-mindedness.

The importance of rights generally is that they purport to place normative constraints upon others which demand some form of compliance or forbearance in giving effect to that right. The role of moral rights is not merely to provide a check on already existing legal rights: it is to spur the *evolution* of legal rights in accordance with those interests which we perceive to be of sufficient import to persons that normative constraints on others are justified. For this reason, it is important to view children as rights-holders instead of recipients of largesse. The former presumes to demand obligatory compliance while the latter has a discretionary connotation. The choice versus welfare theses of rights debate fails to recognize the fundamental principle that children stand in a position of parity with adults with respect to the importance of their interests, and in particular, have an equal interest in leading (whether presently or in the future) autonomous lives.

While for adults, this will precipitate negative liberty rights, for children it will impose positive duties in making available to them an education for open-mindedness. Rights which entail such broad and general duties are typically criticized as they fail to guide anyone's behaviour with sufficient predictability. I have argued that the duties of teachers, administrators and school boards in delivering an education for open-mindedness are sufficiently circumscribed to be behaviour-guiding. Secondly, while it appears at first blush that it is unreasonable to hold all of society to a duty for one person, this construct is inaccurate. *Everyone* has an interest in this kind of education as he passes through our schools, and so the right is engaged for us all. Furthermore, an education for open-mindedness is not only a right, but a duty which we owe to our fellow citizens as part of discharging the burdens of judgment.

I conclude that children have a powerful claim to an education for open-mindedness which warrants status as a moral right which will, in chapter seven, form the basis of a case for constitutional recognition of the moral right to an education for open-mindedness. But first, let us examine the moral rights of parents.

The Moral Rights of Parents

The argument to this point leads to the conclusion that children have a moral right to an education for open-mindedness which can and should be effected through recourse to constitutional principles in educational policy-making. But to end the story here is premature. It is characteristic of a right that it is, at least initially, a source of *prima facie* reasons only. A right is not compelling until, *in a particular context*, it is weighed against countervailing interests and rights, and found to be of sufficient import to best these rivals. No right exists in a vacuum and children's rights are not exempted.

The conflictual nature of rights is implicitly recognized in section one of the Charter.

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I believe that the strongest argument to be made against the kind of education I have proposed is the parental claim to the right to direct the education of one's own child. Where the rights of parents and children conflict, a resolution will demand a qualitative understanding of the importance of competing rights. Thus, in this section, I shall examine this claim, commencing with an analysis of the basis of parental interests upon which it is founded. I shall then hold it up to the prima facie children's rights we have elaborated in order to bring into relief any conflicts and to resolve conflicts in favour of the interests of greatest import.

Historically, the role played by parents in the education of their children has been a largely informal one. Yvonne Martin comments that

> ...the involvement of parents in educational decision-making was not formally recognized before this new [British Columbia] *School Act*. Parents as a group had no legal status as participants in the decision-making process. Traditionally, as in many other jurisdictions, they had to resort to political pressure, particularly at the local level, to affect decisions governing the education of their children (1992, p. 66).

Jeannie House (1995) echoes this perception, describing the traditional system as a top-down model where decisions flowed down from bureaucrats, administrators and experts to their consumers, children and parents (p. 30). Despite recent provincial legislation to formally involve parents in decision-making processes through the creation of 'School Councils,' 'Parent Councils,' 'Parent Committees' or 'Parent Advisory Committees,' both scholars identify most of these efforts as essentially window dressing. Much of the language is suggestive rather than compulsory and circumscribes parents' roles as being primarily an advisory one. Such ambiguous legislation, they argue, marginalizes parents and ultimately fails to recognize their legitimate desires in shaping the education that is made available to their children.

It seems clear that more and more jurisdictions are attempting to involve parents in the decision-making process by formalizing their role in legislation. In fact, in Quebec, parents play a mandatory and very real part in setting the goals and objectives for schools and school boards (Martin, 1992, pp. 72-74). But before the trend gains significant momentum, we ought to consider the proper role for parents. No one denies that parental involvement is important, but the democratizing of the educational system cannot take place without some firm ground rules which are based on properly conceptualized roles which remain mindful of competing interests.

As a caution, I think it is important to view historical parental involvement in its proper context. It is not helpful to view parents as systemically created doormats who have been trodden upon by heavy-booted educational bureaucrats. I think this is a revisionist theory which is not entirely accurate. I suspect that the informal power formerly wielded by many parents was more than adequate to their purposes. The society of which they were a part was largely homogeneous and would surely exert tremendous hegemonic pressures. Differences in race and culture were vulnerable to being erased in the assimilative machinery of the schools – schools which perpetuated a white, Anglo-Saxon, Protestant culture. Of course, minorities were expected to adopt the dominant culture, and so one questions whether minority communities were well-served.

Furthermore, children's rights were a curiosity in a system which had built into it the respect for both adult and parental authority. Parents of the dominant culture didn't *need* anything more than informal decision-making power in education because the system was already designed to meet their needs. It makes sense that parents' interests would dictate historical structures. Firstly, because children are immature, they are not vocal claimants of rights. Indeed, they rely upon parents and other adults to defend their interests in a paternalistic way. Secondly, parental interests have a temporal immediacy to them which is often absent for children. That is, the implications of educational policies upon the development of children may not be apparent for years. It is only with the relatively recent consciousness of children's interests as being distinct from their parents' that power has been wrested from parents' hands – power, which, understandably, they seek to regain. The concurrent dramatic influx of other cultures in our present-day pluralist society has further demanded deference to diversity. The accommodation of such difference has further prompted parents to seek to influence decision-making. With this in mind, and with tempered sympathies, we can delve into the nature of parental rights in education in a more productive way.

Enabling Rights

The first possibility to consider is that parents have no rights with respect to their children's education apart from those necessary in order to serve the best interests of the child. It should be noted that, phrased in this way, it is presumptive that parents do indeed hold what I shall call 'enabling rights' as necessarily instrumental to the welfare of their children. A fuller understanding of that presumption, however, is necessary in order to clarify parents' role in education.

A substantial body of research supports the conclusion that significant, intimate relationships with adults are crucial to the healthy cognitive and emotional development of the child. For this purpose, the care of children in nuclear families is particularly well-suited.[2] Francis Schrag suggests that the preservation of the I-You relationship between parents and children (primarily within the context of the nuclear family) is key to the kind of environment in which children thrive. The "myth that the growing child is their own personal creation" sustains this relationship (1976, p. 203).

> This mode of relationship is best exemplified by (though not limited to) the intense love which sometimes exists between man and woman or parent and child. Such love clings to a unique individual, not to a set of properties, not even to merit. According to philosophers and poets such love is irrational, akin to madness. In the I-You relationship, we may say, the person

> encountered is without properties. Commitment is not transferable; it is hence unconditional (p. 203).

The care and affection which parents are inclined to lavish upon their children (perhaps even more than anyone else might be willing to do) complements children's need to be cared for and to receive affection in order to flourish. The nuclear family, which nurtures strong familial ties, and in particular, the relationship between children and significant adults, is an incubator for children's salutary development. It follows that if these ties are to be encouraged, then parents must have some latitude in making decisions concerning the care and upbringing of their children. This latitude will certainly include some substantial authority over educational issues concerning their children.

Further support for this position is lent by the child's need, not only for love and attention, but for what some scholars have called 'cultural coherence' in child-rearing. That is, "the care received by any child must come from adults who exhibit at least a rough overall consistency in the character traits and capabilities they encourage, what they declare to be true and false, worthwhile and trivial, and the like" (Callan, 1997, p. 138). Indeed, without some consistency in the child's early formative influences, it is doubtful whether a coherent self could emerge at all (Ackerman, 1980, pp. 140-146; McLaughlin, 1984).

> To become a being capable of posing alternatives, one requires a sure and certain place from which to start. In Mary Midgley's words: "Children...have to live in a particular culture; they must take some attitude to the nearest things right away" (Elshtain, 1989, p. 64).

This suggests that even though the precise beliefs and values imparted to children by parents may be suspect, we may want to be slow to interfere, given the child's interests in being raised in a caring environment and in an environment conducive to the development of a coherent self.

This case for parental authority in the upbringing of a child is a strong one. It is also relatively tidy in terms of rights entanglements. If enabling rights are held by parents exclusively in a fiduciary capacity, then questions of educational import must be decided by reference to the best interests of the child, on the whole. At times this may dictate deference to parental authority, and at other times, that it be over-ridden, but it will turn on the empirical determination of the child's welfare. "The fundamental duty owed to the child in the paternalistic relationship," Strike contends, "is to help the child to actualize those human potentials, the possession of which makes one an autonomous moral agent entitled to the full range of human rights" (1982, p. 20).

Elshtain elaborates that parental authority, although it offends democratic sensibilities, is nonetheless necessary to the development of civic-mindedness.

> Familial authority, although apparently at odds with the governing presumptions of democratic authority, is nonetheless part of the constitutive background required for the survival and flourishing of democracy. Family relations could not exist without family authority and these relations remain the best basis we know for creating human beings with a developed capacity to give authoritative allegiance to the background presumptions and principles of democratic society as adults (p. 63).

The argument, then, runs as follows: the development of both personal autonomy and civic virtue depend upon certain features of a child's upbringing. Firstly, the child needs to be raised in a caring environment structured by significant adults in her life. Secondly, the child needs to obtain a 'starting set' of beliefs, values and attitudes which must be presented to her in a sufficiently coherent fashion. In order to achieve this kind of environment, parents must be given some measure of authority in their children's lives to make decisions affecting them. This authority gives rise to enabling rights, which are rights which the parent exercises in the best interests of the child.

The difficulty is that it will not always be easy to determine the best interests of the child. That parents should be accorded such rights in the first instance makes sense: they love their children and arguably know them better than anyone else and are therefore in a privileged position to know what is in their best interests. But this argument is a double-edged sword. It may be that it is precisely *because* parents have a stake in their children that they may fail to see their best interests. In other words, the child's welfare becomes so enmeshed with the parents' own interests that parents may come to view them as being synonymous. For example, a parent may try to remedy mistakes made in his own life by re-living them through his child's. The parent may insist that his child become a doctor, despite not the slightest inclination nor aptitude on the child's part to do so. It makes no sense to allow the enabling rights accorded to parents to be distorted to the extent that they undermine the very reasons for those rights.

The question, then, is whether the enabling rights we accord to parents will grant them the authority to govern the education of their children, such that they might effectively veto an education for open-mindedness. I have argued that an education for open-mindedness is a *sine qua non* to empowering children to choose the autonomous life for themselves, and to enable them to participate in the democratic process in a meaningful way. In a liberal democratic society, the possibility of engaging in autonomous decision-making must not be curtailed, lest we commit an affront to the principle of respect for persons. These are two roles which cannot be abdicated. Thus the power with which parents are endowed by enabling rights to make educational decisions in respect of their children, cannot compromise the integrity of the educational system to deliver these goods to their children. The enabling rights of parents cannot jeopardize an education for open-mindedness. While parents have broad latitude to exercise their paternalistic discretion, and while the margins of the rights will be soft enough to allow for some parental failings without triggering state intervention (because of the need for cultural coherence), an education for open-mindedness is so vital to a child's personhood – *the very raison d'être of enabling rights* – that parental authority in this area must conform or be held at bay. Enabling rights are, at their source, duties owed to children by parents.

If we are to ascribe enabling rights alone to parents, many matters relating to children will be resolved easily enough. Things will not be quite so simple if we recognize parental rights broader than enabling rights. Do parents have any rights apart from the enabling rights which we have conceded, and which must be exercised in the child's best interests? Yael Tamir denies that parents have any 'right to educate' at all, apart from those rights we have already discussed which arise from the child's right to be educated (1990, p. 163). To address this issue, we turn to a discussion of the intelligibility of self-regarding rights of parents in the child-rearing context.

Self-Regarding Rights of Parents

The basis upon which Tamir rejects the parental claim to a right to educate is that to admit of such a right would compromise children's ability to make free choices in the future (p. 169). The future autonomy of children is of such importance that it would be morally indefensible to place it in such a vulnerable and subordinate position. But we cannot ignore that the autonomy of adults is similarly constrained by failing to accord them the right to educate their own children.

Charles Fried articulates the contrary view that "the right to form one's child's values, one's child's life plan and the right to lavish attention on the child are extensions of the basic right not to be interfered with in doing these things for oneself" (1978, p. 152). Fried justifies the extensions of a person's negative rights of action to include his child in two ways. Firstly, he suggests that this is a consequence "based upon the facts of reproduction." The second argument is based on a process of default. Children cannot choose their 'most intimate values and determinants,' and since no right inheres in the state to make these choices on behalf of children, parents inherit rights over their children by virtue of their biological connection. As such, Fried advocates a very broad and almost inviolable sphere of parental authority over their children.

Fried's argument strikes a chord. The morally dubious aspect of enabling rights is that they view parents merely as instrumental to their children's welfare and abrogate other interests parents may hold quite apart from this role, interests which may, at times, even be in conflict with parental obligations. Parents' autonomous, and otherwise legitimate choices about how to lead the good life must carry some weight if we are to respect parents as persons. Parents ought not to be flippantly divested of the freedom to seek their own good, merely on account of their status as parents. They continue to hold vital interests in such things as free association, free speech, and freedom to practice their religious way of life and so on. Consider, for example, the case of a religiously devout parent whose faith demands that he bring up his children in accordance with the tenets of his religion. The parent's right to practice his religion to the letter necessarily entails allowing him some room in directing his child's upbringing. In this context, the right to direct the education of one's child is derivative of the right to practice one's own religion or to follow the dictates of one's conscience – it is based on the parental self-regarding right to exercise autonomy within a given sphere. From this perspective, parents have a unique interest in their *children's* lives, an interest which is not necessarily co-extensive with the child's best interests.

> The role of parent is commonly undertaken as one of the central, meaning-giving tasks of our lives. Success or failure in the task, as measured by whatever standards we take to be relevant, is likely to affect profoundly our overall sense of how well or badly our lives have gone. Although the measures of success in child-rearing that we might honourably accept are highly variable both within and across cultures, they almost always include broadly educational needs of one sort or another. Parents hope to rear children who will possess certain prized skills and virtues, or who will live by a certain religious creed or sustain a cherished ethnic identity (Callan, 1995, p. 142).

For the state to deprive parents of such an abundant source of meaning, fulfilment and self-expression in their lives would not be the service to liberal democracy it would purport to be, but a dangerous lapse into tyranny.

Nevertheless, the objection which was raised with respect to enabling rights – that they failed to recognize the *unique* interests of parents which might give rise to core rights vis-à-vis their children's upbringing – has merely changed its allegiance in Fried's theory. That is, while enabling rights treated parents as filial doormats, Fried's theory welcomes parents to dust their shoes on their children's rights. To be sure, parents have unique autonomous interests which pervade even familial relationships. But if one recognizes that parents have autonomous interests *as persons*, one must concede similar interests adhere to children, *although the specific requirements to respect those interests in autonomy will manifest themselves in different ways.* The parental interest will often be more immediate and practical, the child's interest more future-oriented and developmental. The point to be made is that *all* persons have a profound interest in having accessible to them the means to lead autonomous lives. As such, the interests and rights that flow therefrom make poor textiles from which to cut doormats.

The moral integrity of the parent-child relationship is salvaged by the concession to the egalitarian nature of the parties involved. That is not to say that parents and children are the same, for that is clearly not so. It is to say that there is a parity of value as persons, ergo a parity in the value of the interests each brings to the relationship. As such, the girders which we erect to support the parent-child relationship will be the interests of both parents and children and will be strong enough to support both parental rights and children's rights within its structure. Having conceded that our construction materials must be of both types, the question then becomes one of architectural judgment: How are we to determine whether a parental interest or the child's interest ought to prevail in any circumstance where there is an apparent conflict? In particular, how are we to resolve a parent's right to educate from a self-regarding point of view with a child's right to an education for open-mindedness?

Familial Privacy

If we agree that parents ought to have some breadth of authority to make educational decisions on behalf of their children, and that both parents and children do not shed their rights in the familial context, the question becomes one of determining precisely when the state ought to intervene in the discretion of parents. Some scholars advocate strict threshold conditions amounting to a clear and present danger criterion (Schoeman, 1980, p. 10) before state intervention in the bastion of the family would be appropriate. Restraint in intervention is predicated upon the belief that non-intervention is typically in the child's best interests (as elaborated in the previous section) as well as in the best interests of the parent. The justification is that the parent-child relationship thrives in an environment away from the glare of the state and free from state interference which will dictate how their intimate relationship will be governed. One device which has evolved to cocoon the relationship is the idea of familial privacy. Familial privacy, the argument goes, finds its justification in its importance to the development and sustenance of intimate relationships – relationships which, arguably, are the primary contributors to meaning-giving in individual lives (Schoeman, p. 6).

It is important to note that, in the context of our discussion, familial privacy is not being used as an argument to support parental despotism over their children – we have already done away with that extreme view. What we are facing is the more difficult task of ascertaining precisely where parental authority ought to give way to a child's countervailing, and contradictory interests. Specifically, can the parental right to educate trump the child's right to an education for open-mindedness in such a way that the parent may prohibit the child from accessing such an education and may simultaneously count on the state's deference to his wishes?

It is noteworthy that the idea of familial privacy is purportedly to safeguard the welfare of parents and children alike. The difficulty with the clear and present danger criterion in the context of my argument is that it conjures up images of physical abuse and grave psychological damage – something which is associated with the worst cases of parenting. If one accepts this as the standard, the state would be hard-pressed to argue that this threshold has been reached in cases where parents merely do not wish for their children to have access to controversial materials in the schools. Although the right to educate one's children escapes the four walls of the familial domicile, the principle of familial privacy has been elevated to an abstract one which does not respect the geographical confines of the family home. Indeed, the idea of familial privacy has been extended into what are generally considered public institutions, of which schools have not been exempted. This has come about, I imagine, from the realization that if one's purpose is to protect intimate relationships, particularly the parent-child relationship, then it is artificial to draw lines about a domicile. The interest in familial privacy, then, has come to be defined generously in public policy, granting parents significant latitude in directing their children's education.

Another element which has served to shape public policy has been the reluctance to cast the parent-child relationship in terms of rights, particularly in terms of children's rights. While these are seen as protecting children's interests in an unbalanced relationship in terms of power, the perceived problem with children's rights is that they give the state a toehold into intimate familial relationships and make them vulnerable to state intrusion and regulation. The concern is that the relationship will come to be seen as quasi-contractual, something which risks elbowing aside the spontaneous motivators of love, care, self-sacrifice, and so on. Schoeman relies upon Lon Fuller's research into principles of human association to illustrate this point..

> As the legalistic principle comes to dominate the parties' image of their relationship with one another, the element of shared commitment tends to sink out of sight. State intervention into a relationship, Fuller argues, tends to shift the emphasis of the relationship in the direction of formality and abstractness. The very act of precisely sorting things out in conformity with the legalistic paradigm tends to wring out aspects of inner commitment (Schoeman, 1980, p. 15).

Schoeman adds:

> Since society cannot determine and should not try to determine who may have intimate relationships with whom, if a person chooses to have his relationships in a family setting, society should not interfere, since that kind of choice is essential to intimate relationships in general.
>
> Thus, as a way of transcending oneself and the boundaries of abstract others, as a way of finding meaning in life, and as a means of maintaining some kind of social and moral autonomy, the claim to freedom from scrutiny and control in one's relations with others should be thought of as a moral claim as important as any other that can be envisioned...Other things being equal, parents consequently are entitled to maintain their offspring and seek meaning with and through them (p. 17).

Schoeman's first point is that construing familial relationships in terms of rights and responsibilities will be deleterious to the kind of supererogation on the part of the parent necessary to the child's salutary development, because it will rob parents of more noble motivations in the treatment of their children. The first counter-argument is that, if one concedes that children hold *any* rights vis-à-vis their parents, then one must also concede that, since children are generally unable to enforce rights on their own behalf, some state intrusions into familial privacy are inevitable and indeed imperative. We can only escape this difficulty if we are prepared to claim that children ought not to have any enforceable rights against their parents. I suggest this would be an untenable position to maintain, given the possible, if unlikely, horrific results of unfettered parental authority.

Next, it is important to note that Schoeman's claim is an empirical one which I would suggest is inadequately substantiated. Lon Fuller does not fully theorize the parent-child relationship. Fuller contends that the primary purpose of customary (informal) law, contractual law, and, at least in its inception, enacted law is to order and facilitate interaction (1969b, p. 20) But there are difficulties, he argues, in attempting to import either contractual processes or formal legal principles into intimate relationships, an example of which would be the family. As concerns the efficacy of contractual principles between the members of a family, Fuller notes that people united by affection have difficulty in negotiating the terms of their rights and responsibilities (1969b, p. 27). One might add that children, particularly young children, are hardly in any position at all to negotiate the terms of their relationship with parents and siblings. But more importantly in his view, "no degree of contractual foresight would be equal to dealing in advance with all these permutations in the internal affairs of the family" (1969b, p. 28). That problem is even more acute in the case of enacted law.

> If enacted law and contractual law are alike in finding especially congenial the midpoint on the spectrum of social contexts, they also share an ineptitude for attempting anything like internal regulation of the family. If a contract of the

> parties themselves is too blunt an instrument for shaping the affairs of the family, the same thing could be said with added emphasis if any attempt were made to impose detailed state-made regulations on the intimate relations of marriage and parenthood (Fuller, 1969b, p. 33).

His chief concern, it would appear, is that to regulate these relationships would be impractical. In fact, his footnote adds the proviso that he is not "referring to such problems as child abuse, compulsory education and the like" (1969, p. 33). Indeed, this makes sense for two reasons. Firstly, the kind of regulation required for some instances of enacted law will not be of a detailed nature, but will reflect general principles. This will obviate the need for constant state intervention in minor details of family functioning. Secondly, the exempted type of regulation seems to fall within a category of interests which are of paramount importance, as, for example, the physical integrity of persons. Thus Fuller need not disagree that ascribing a right to an education for open-mindedness to children will escape the problem of state intervention akin to nuisance, since his criticism of enacted law in intimate associations does not undermine the legitimacy of this particular right.

The second problem which Fuller highlights is that, as associations come to be governed increasingly by formal legal principles, these come to erase feelings of shared commitment. Fuller describes an association which is governed by the legal principle as one which is held together and enabled to function by formal rules of duty and entitlement (1969a, p. 6). His seventh law cautions that "once underway, the development toward dominance by the legal principle feeds on itself and becomes accelerative. The aging association commonly displays the symptoms of what may be called creeping legalism" (1969a, pp. 13-14). In this light, the ascription of rights to children is the apocalyptic precursor to the storming of the bastion of the family. The case for the right to an education for open-mindedness, however, leads to no such thing, and from one perspective, fortifies true shared commitment.

The culprit that undermines shared commitment in intimate associations is not the legal principle itself, but certain features of legalism which are incongruous with that shared commitment. In particular, the legal safeguards of due process require that we isolate the act which has been committed, and turn our gaze away from the person. In this sense, there is an objectification of the person. "The legal principle," Fuller states, "must deal, not with the qualities of the person, but with his acts and their conformity to the rule" (1969a, p. 17).

However, not all cases of rule infringement apply or ought to apply the principles of due process as commonly understood, as some cases do not lend themselves to this kind of procedure. Fuller comments that as the intimacy of an association increases, the emphasis shifts from the act to the person (1969a, p. 17). If we are to respect the nature of intimate associations and to take care not to crush them under the weight of enacted law, a middle ground will be to consider, in the regulation of the rule, the person and not the act. Fuller acknowledges this when he alludes to cases of adoption and child custody, where the procedures the judge adopts "depart radically from ordinary conceptions of due process," and where she proceeds primarily by "inquisitorial and mediational methods rather that those of trial in open court" (1969a, p. 19). He adds:

> [I]f the law of the state finds itself compelled to relax requirements of due process when it deals with the formation and dissolution of intimate associations, then we must view with some caution any gross extension of legal

> forms throughout our whole associational life. The bonds that bind the member to a trade union, a school, a church, or a club, may not be as intimate as those that unite husband and wife, but it does not follow that they are ready to be bent uncompromisingly to the demands of due process.

The point is that legal principles embodying the child's right to an education for open-mindedness need not deteriorate into the sterile conviction and retribution of offending parents. The right to an education for open-mindedness is consistent with a robust respect for familial intimacy.

The parent-child relationship is distinguishable from others in that, in its inception, the parties do not 'negotiate' (either formally or informally) their respective positions in terms of obligations, responsibilities, duties, and what they demand in return. Although the parent may benefit from his relationship with his child, the initial flow of obligations is largely unidirectional. Parent and child are not tossed into the ring and expected to slug out their duties and claims between themselves as two competitors in the same weight class. The kind of interpersonal tension which might arise when two parties vie for rights leaves the parent-child relationship unscathed.

Perhaps because children *need* caregivers in order to survive, parents who choose to have children commit themselves to the caregiver role. Indeed, the need to care for a child, to devote oneself to her upbringing is *fertile* ground for those tender feelings which lead a parent to sacrifice his own interest for the welfare of his child. That the state might impose minimum restrictions on the care of his child is hardly anathema to the flourishing of an already loving relationship. In principle, it aligns with the parent's own desires. If one is already fulfilling one's moral obligations to one's child by conforming with what are generally considered to be principles of good parenting, what does it matter that the state superimpose a legal obligation to catch those cases where parents do not live up to their responsibilities? If I, as an employer, pay my employees a fair wage because I feel it is my moral obligation to treat my employees justly and to respect the value of their work, will I be less inclined to be fair and just simply because a legislative act might dictate certain standards of minimum wage? It is not at all intuitive that in these circumstances, the parent would withdraw natural parental affection from his child and relinquish all duties to him which did not arise from the state-imposed legalistic safety net, as Fuller would seem to suggest. Unlike other relationships, parental affection is *born* of obligation, and so one would expect the loving bond between parents and children to prevail over meaner, legalistic structures.

Paradoxically, the capacity to engage in true shared commitments which are reciprocal rests on the autonomous decision to participate in a particular association. "A commitment seeks a *voluntary* summoning of energies," Fuller states, "that no formal legal duty can command or even purports to command" (italics mine)(Fuller 1969a, p. 12). Since autonomy relies upon open-mindedness, that choice may not be authentic unless the participants are open-minded to some extent. We would hardly consider someone who has been raised or conscripted into a cult by brain-washing techniques, for example, to be voluntarily sharing a commitment. Rather, we would be more apt to see this as a case of coercion and consider it an offence to the recruit. In the same way, banishing legal principles from the realm of intimate relationships may well undermine the very reason for expatriating legal principles in the first place – the desire to enshrine shared commitment.

What of Schoeman's argument for intervention in familial privacy only in circumstances of clear and present danger? We will recall that Schoeman premises his argument upon the right to engage in intimate relationships, and that "if a person chooses to have his relationships in a family setting, society should not interfere, since that kind of choice is essential to intimate relationships in general." Schoeman emphasizes, correctly I think, the qualification that these associations must be of a person's choice – something in which we participate voluntarily. That is not to say that no intimacy can occur unless the parties have *chosen* to enter into such a relationship, only that *choice is a pre-condition to a societal laissez-faire demeanour vis-à-vis intimate relationships.* In other words, the state does not refrain from meddling in intimate relationships simply by virtue of their status *as* intimate relationships; rather, the state does not intervene because two parties have *freely chosen* to participate in such alliances. The state's deference is to the parties' *capacity* as free and autonomous beings and it is in the lee of this capacity for choice that intimate relationships take refuge. Where this capacity is not extant, and in the case of children, it clearly is not, the protective sphere about intimate relationships is not impregnable. David Archard exposes this difference.

> In the first place, intimate relations are between equals, or at least between two persons each possessing rights. That between a parent and their child is one between an independent superior and a dependent subordinate...[O]ur relations with friends and lovers are chosen, whereas a child does not choose its parents (1993, p. 124).

The incongruity between the position of power of the parent and the child's position of vulnerability and subordination goes hand in hand with the element of choice in intimate relationships. That these relationships exist absent the child's free choice to engage therein is reason enough to question the benefits of privacy in such a relationship.

> [I]ntimacy can only provide a compelling reason for its precondition, privacy, in the absence of any equally or more compelling countervailing reason. Intimates should have their privacy respected only so long as there is no good reason to intrude upon it. It is naturally very hard to see what, in general, such reasons could be in the case of lovers or friends. But in the case of the relationship between parent and child there is one. This is that some parents do abuse or seriously neglect their children. The harm done a child is undetected if perpetuated in 'private' (Archard, 1995, p. 125).

What, then, might count as "a more compelling countervailing reason" in the context of the conflict between the parental right to direct the education of one's child and the right to an education for open-mindedness? We will recall Schoeman's earlier reasoning that, "as a means of maintaining some kind of social and moral autonomy, the claim to freedom from scrutiny and control in one's relations with others should be thought of as a moral claim as important as any other that can be envisioned" (1980, p. 17). Schoeman is correct, I think, in identifying social and moral autonomy as a reason to create a presumption, but not a presumption of non-interference in familial relationships as he suggests. Self-determination is indeed crucial to maintaining our integrity as persons. But if we acknowledge the egalitarian nature of persons in the family unit, then the child's interest in achieving social and moral autonomy is equal to that of the parent's. The question, then, is whether the child's interest in an education for open-mindedness is *more* crucial to autonomy than the parties' interests in being left to engage in intimate relationships in private.

The Ordering of Parents' and Children's Rights

Let us gather up the parental bundle of self-regarding rights which we have acknowledged parents hold in relation to directing the education of their children. Parents have a right to direct the education of their children because it piggybacks on the exercise of other self-regarding rights which attach to persons as autonomous beings. These include, for example, the right to practice one's religion freely as well as the right to form intimate relationships free from state regulation. The crux is that these rights derive from a view of persons, in this case parents, as autonomous. Yet the child's right to an education for open-mindedness rests similarly on this premise. How are we to order the respective claims? When we look closely at the two interests in autonomy, viewed from different angles, we are reminded that children's interests are of a developmental nature while parental interests are primarily of a practical nature. By 'practical' I mean that examples of autonomy are generally *manifestations* of their autonomous choice. I want to suggest this: *Developmental autonomy interests will generally be more important than any particular instance of the exercise of autonomous choice.* I think this can be said without jeopardizing the principle that parents and children are equal in terms of the overall importance of their interests. The child's developmental interests to autonomy will generally trump parental interests to the exercise of autonomous choice *because the latter depends upon the former in a developmental sense.*

Adults are shackled in making truly autonomous choices in their maturity *unless* this capacity has been developed during their formative years. In this sense, developmental interests are psychologically fundamental. Since an education for open-mindedness is essential to the development of autonomic capacities, this is not just an important interest, but a crucial one. Indeed, the freedom accorded to adults to govern their own lives, including allowing them to engage in private intimate relationships, is based upon the *assumption* that the developmental capacities have blossomed and that adults are thus capable of governing their own lives. It follows that the parental interest to privacy in the familial context must defer to the child's developmental interest in an education for open-mindedness. Ultimately, the state must intervene to ensure that the preconditions for autonomy have been made accessible to children in order to make sense of state non-intervention in personal liberty when one reaches maturity.

To allow parents to make this choice on behalf of their children, is to effectively usurp the child's *choice* to become autonomous. Although the child might eventually distance herself from the Socratic life of critical self-examination and come to lead a life of unquestioning faith, for example, the choice is hers to make. While it would be a violation of personal sovereignty to command that all citizens lead their lives as exemplary models of autonomous personhood, yet the decision to lead a deliberative self-directed life must be an option. To deny this would be tantamount to saying that persons ought not to have access to those skills and resources which might enable them to make sound, reasoned choices in their lives. To allow parents to veto this opportunity for their children is more than a personal repudiation of autonomy as a sound life's choice; rather, it is a violation of their children's rights as *agents* to opt to lead their lives in an autonomous fashion. My claim is not the presumptuous (and easily defeated one) that the development of personal autonomy matters above all else, but the more modest and defensible assertion that as agents, we have a powerful claim to have *access* to the kind of life which is governed by an autonomous will. While the parental right to educate may be broad indeed, it must cede at the point where its effect would be to foreclose the possibility of an autonomous life for their children. While the effect of acknowledging that children's right to an education for open-mindedness trumps the parental right to educate might appear to bear the blush of partiality, this is a facile conclusion. Indeed, *it is in this way alone that the morally egalitarian nature of parents and children may be respected.* Conversely, to acquiesce to the parental right in this case would be to favour (in a biased way) parental interests above those of children: it would be a concession to the moral superiority of parents in terms of individual worth.

It will perhaps be little solace to parents to reassure them that such a determination is the least invasive means of securing children's rights. Indeed, it is not my goal to capsize the vessel of the parental right to educate. Parents have children in order to share their lives with them, and a large part of that is founded upon the existence of common beliefs and values. Parents have a right to direct the education of their child – it is simply neither an unfettered nor an exclusive right. Parents will, of course, continue to educate their children at home, informally and practically free of state constraints, but they may not insist that schools reinforce those values through positive pedagogical practice and materials, nor that their children be exempted from participating in exercises and coming face to face with materials which may conflict with their own teachings. Insofar as those materials and the teaching of them may huddle under the protective umbrella of an education for open-mindedness, they must weather the tempest of parental disapproval.

Summary of the Moral Rights of Parents

The most serious opponent to the child's right to an education for open-mindedness will be the parental right to direct the education of one's child. This parental right may rest on the justification that parental rights are necessary in order to conform to the child's best interests. Children need the love and cultural coherence parents can provide to them, and parents are the most likely to deliver these goods to children. In order to secure the conditions of this healthy environment, parents must be given some latitude to make decisions concerning their children, including educational decisions. It also means that there will be some substantial room before the state will intervene in parental discretion, even when a parent's decision may be wrong and may not be in the child's best interests in any given instance. Nevertheless, the right to an education for open-mindedness cannot be compromised by parental decision-making. It is a virtue of such import to autonomous personhood, that we cannot resolve the issue in favour of parental authority. It is not a case where we can say that the parent's decision may be wrong, but that we will tolerate it because, overall, deferring to parental choice will conduce to the best interests of the child.

Parents also exercise authority over their children because these rights are ancillary to other parental self-regarding rights which we ascribe to autonomous persons, such as the right to practice one's religion. The question is which right will take priority in cases of conflict. I have argued that this dispute can only be resolved by acknowledging the morally egalitarian nature of parents and children. As such, both have an equal interest in having accessible to them the means to lead autonomous lives. Once we can be satisfied that ascribing rights to children in the familial context (and in particular the right to an education for open-mindedness) will not imperil that intimate relationship so crucial to both parents and children, we are free to make the judgment based on which self-regarding rights are more important to autonomy.

The conclusion at which I have arrived is that the child's right to an education for open-mindedness pre-empts the parental right to direct the education of one's child, in cases where a conflict arises. This is so because the developmental interest children hold with respect to open-mindedness is logically prior to the kind of autonomous decisions made by adults. The latter thus depend upon the fruition of an education for open-mindedness to give them meaning. In the next chapter, we will examine whether the law corresponds to the theory so far advanced with respect to the moral rights of children and parents.

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[1] By this I shall mean all rights which do not fall within a state-sanctioned scheme of rights.

[2] See Urie Bronfenbrenner, U. (1975) *A Report on Longitudinal Evaluation of Preschool Programs*, vol. 2, *Is Early Intervention Effective?* DHEW Publication no. (OHD) 72-25 Washington, D.C.: Government Printing House; and Goldstein, Freud, and Solnit (1973) *Beyond the Best Interests of the Child.* New York: Free Press.

CHAPTER SEVEN

CHILDREN'S RIGHTS AND THE LAW

Introduction

The previous two chapters were devoted to making a case for children's moral right to an education for open-mindedness. Although this may be defeasible, depending upon countervailing reasons, moral rights are reflective of interests perceived to be of vital importance to personhood. It is the thesis of this dissertation that an education for open-mindedness is a vital interest, given that it is a *sine qua non* to autonomous personhood and citizenship. If I have been persuasive in arguing that accessibility to an autonomous life is necessary if we are to take respect for persons seriously, then the child's moral right to an education for open-mindedness cannot be denied.

My goal in this chapter is to construct a legal argument which substantially reflects the moral right I have defended to this point. In other words, I shall argue that the child's right to an education for open-mindedness can and should be recognized in Canadian law. I wish to allay fears that, in making this argument, I am being fanciful by embarking on a project which is founded upon wild conjecture and irresponsible legal interpretation. Indeed, I am quite confident that the moral right for which I have argued can quite properly find a conventional home in the *Canadian Charter of Rights and Freedoms*. Not only is the *Charter* sufficiently commodious to embrace such an argument, but, on the other end, constitutional jurisprudence has also evolved to the point where ample linkages can be made between my argument and the law as it now exists.[1]

This argument will entail, of course, a descriptive and analytical component of the current state of the relevant Canadian law. As one might expect, a scant two decades of constitutional *Charter* rights interpretation cannot have generated more than a modest collection of cases germane to our purposes, particularly in comparison to some lengthy constitutional traditions, such as that in the United States. Furthermore, Canadian courts have already caught on to the benefits of assessing American law as a shortcut through the constitutional woods and perhaps to avoid some of the fumbling to be expected in the infancy of constitutional interpretation. For both of these reasons, I shall refer to the American scene quite frequently. While Canadian courts are by no means bound by American law, yet it is an influential factor in the development of our own, and may signal the direction Canadian law is likely to take when similar cases come before Canadian courts.

The fact that we should have to creatively interpret existing rights, and creatively fashion corollary rights to give effect to those is not a fanciful exercise, for it is precisely the attitude the courts must adopt if they are to do justice to the *Charter*. Indeed, the document was *intentionally* drafted in a broad manner, so that it might catch situations which no one could foresee at that moment in time. Justice Dickson speaking on behalf of the Supreme Court of Canada in *Hunter et al v. Southam Inc.* (1984), 9 C.R.R. 355 made the point in this way:

> A constitution…is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of

> individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind (p. 364).

No apology need be made, then, for asking courts to consider novel interpretations. The importance of the interests upon which the argument is based provides the impetus that is necessary. The onus will rest on courts to weigh these interests and provide appropriate remedies in the context of the *Charter* as a 'living tree.'

The Role of the Judiciary in Educational Matters

Educational matters have historically been within the purview of provincial authority. This jurisdiction was conferred by the *British North America Act* and exempted only denominational, separate and dissentient schools. However, the *Constitution Act, 1982* ushered in a new era, where judicial intervention is permissible in cases where legislation and state action is in contravention of those rights delineated by the *Charter*. Of course, under section 32(1), the *Charter* catches only actions which fall within the scope of 'government' and it is not entirely clear whether provincially created school boards will be construed as governmental bodies for the purposes of *Charter* review. Despite the absence of a decisive ruling on this issue, there is both a strong philosophical argument to be made in support of an affirmative response, and sufficient legal precedent to sustain that conclusion.[2] For the purposes of this argument, I shall assume that school boards fall within the ambit of s. 32(1).

Despite the constitutional green light for judicial intervention, however, courts have traditionally been deferential to educational experts and professionals in educational matters. Political, rather than judicial, means have typically been resorted to in dealing with educational matters. This is surely part of our culture which will not be erased easily. Even in the United States where citizens seem to be more litigious generally, and where courts have more commonly interpolated themselves into the melee, the Supreme Court in *Epperson v. Arkansas,* 393 U.S. 97 (1968) expressed its hesitation in unduly interfering in the business of educators.

> However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum in every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible (p. 114).

Arthur E. Wise echoes this concern.

> Over the last decade and a half, the United States has pursued two major policy objectives. One concerns equality and the other quality. I believe that the courts and high level policy-makers are well-equipped to deal with equality and are not well-equipped to deal with quality in education. By 'equality' I mean the allocation of human and material resources in the educational system and the assignment of students to those educational resources. By 'quality' I mean the efficiency and effectiveness of the use to which those resources are put in the educational process. An equitable distribution of resources is relatively easy to conceptualize and to measure. On the other hand, quality gets federal and state governments excessively enmeshed in the actual operations of schools. What results is that educational policy is becoming increasingly determined by the courts, the states and the federal government, rather than by the schools themselves (1986, p. 106).

Wise elaborates that judicial or legislative policies are inferior to policies generated locally because "their principles are drawn more from legal than from educational imperatives" (p. 206).

But it would be a mistake to capitulate too readily to the voices of school boards and administrators without adequately exploring the nature of an education for open-mindedness. While one might perceive the actual delivery of curricular policies to students as qualitative, in another sense, the recognition and establishment of those broad policy objectives in the educational forum is something that ought not to be relinquished to educational authorities. Indeed, the recognition of educational objectives emerges from a *societal* discourse about what it means to be a citizen, broadly speaking, and about what it means to be a person, broadly speaking. The aims of education are not a parochial matter, to be determined by the whim or bias of a particular school, school board, or province. Rather, the objectives of the educational enterprise are dictated by the foundational tenets upon which liberal democracies rest. These will certainly include a particular view of persons as self-determining and free individuals and as participating members of a polity. Doubtless administrators, school boards and other educational professionals are the locus of pedagogical and administrative expertise, and in these matters, courts should surely defer. But it would be egregious neglect on the part of the judiciary to abdicate to these entities the responsibility of determining exactly what the philosophical goals of education ought to be.

It is *precisely* the role of the courts to be arbiters in such matters, for the determination of such complicated questions will rely not on pedagogical or administrative deftness, but upon the conceptualization of how education serves liberal democratic ends, and the even trickier business of weighing competing, sometimes irreconcilable, interests. As parties who are involved in the education of children, and whose own interests are certainly enmeshed, it would be difficult to imagine how school boards and administrators might untangle their own investment and be relied upon to render entirely impartial decisions. For these purposes, the courts are particularly well-suited. In *Reference re Education Act of Ontario and Minority Language Education Rights* (1985), 11 C.C.R. 17 (Ont. C.A.), the court made it clear that judicial intervention is appropriate where there has been an infringement upon constitutionally entrenched rights.

> With the enactment of the *Constitution Act, 1982*, the dominant principle of constitutional law is no longer centred exclusively on the division of legislative authority between the federal and provincial levels of government. The preservation and enforcement of the guaranteed rights, including minority language educational rights, and of fundamental freedoms have changed the focus of constitutional law and the role of the courts. We believe that the Court's concern for these rights requires a move away from narrow and strict constructionalism toward a broader approach, which would include a history of the historical developments, particularly in the field of education (p. 30).

And further:

> Any limitation placed on minority language education rights cannot be left to the unfettered discretion of school boards no matter how competent and well-meaning those school boards might be…It is both interesting and helpful to note that the U.S. Supreme Court has developed the constitutional principle that the Legislature may not grant administrative bodies an unfettered discretion to regulate constitutionally protected activities or to make decisions which directly affect the exercise of constitutionally guaranteed substantive rights (p. 44).

At the same time, the Court acknowledged the important role to be played by legislating bodies.

> The judiciary is not the sole guardian of the constitutional rights of Canadians. Parliament and the provincial Legislatures are equally responsible to ensure that the rights conferred by the Charter are upheld. Legislative action in this important and complex field is much to be preferred to judicial intervention (p. 71).

Thus the *Charter* has opened the door to judicial intervention in educational matters where a constitutional right has been infringed, while the court has tempered activism by recognizing that education is a complex field into which the courts should foray with discretion. This is as it should be. I would contend that even a conservative court would have to concede that the constitutional rights implicated in educating for open-mindedness, assuming that constitutional rights are in fact implicated, are of such import that they could not conscionably be immunized from judicial scrutiny by relegating such educational policies as the basic curriculum design to local school boards. In these matters, the judiciary will be amenable to playing the role of a watchdog, albeit of an equably-tempered and restrained breed.

The Parental Right to Direct the Education of One's Child

In chapter six, we engaged in a theoretical discussion concerning the parental right to educate and the extent to which that right might permit parental discretion in the education of one's child. The conclusion at which I arrived was that parents hold not only enabling rights which make room for the right to educate, but also self-regarding rights which would permit authority in making decisions concerning the education of their children. The parameters of the former were drawn by reference to the best interests of the child; the self-regarding right to educate was confined to the extent that these rights, which are predicated upon parental autonomic interests, would be trumped by the child's moral right to an education for open-mindedness. This is so because an education for open-mindedness is more central to the autonomic interests of persons than is the interest in controlling the education of one's child. In this section, I shall examine Canadian constitutional principles and case law to acquire some sense of how courts have construed parental rights in the area of education.

Historically, courts have recognized an almost absolute parental control over the education of their children. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the state sought to make public education mandatory by legislation, which would consequently foreclose the opportunity for parents to send their children to private schools. The United States Supreme Court nullified compulsory public school attendance in stating:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments of this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

It is noteworthy that the court based the decision upon parental liberty, although parents were not parties to the proceedings. Implicit in this judgment are the ideas of both enabling and self-regarding rights which enure to parents. This trend can be seen as well in *Hardwick v. Fruitridge Broad of Trustees* 205 p.49 (Cal. 1921). In that case, the plaintiff father sought to have his two daughters exempted from the modern dancing component of a mandatory physical education program, based on religious grounds. The California appellate court held that children could not be compelled to receive instruction which contravened the religious beliefs of their parents. The court felt that to hold otherwise "would be distinctly revolutionary and possibly subversive of that home life so essential to the safety and security of the society" (p. 54). The parental right to direct the education of one's child has, in American jurisprudence, typically been captured by the section relating to the constitutionally protected rights to the free exercise of religion. But such a parental right might also be construed as a more generic liberty right under the fundamental justice or due process provisions of the Canadian and American Constitutions.

In the years since *Pierce v. Society of Sisters*, however, the courts have increasingly been urged to chip away at what some perceive to be an anachronism. The attack on traditional parental rights is bifurcated: one flank presses the argument for a compelling state interest in the education of the young; the other heralds children's rights as separate and distinct from those of their parents. Together, the arguments for independent children's rights and the state interest in education have made significant, though incremental inroads.

Perhaps the most significant American case which threatened to petrify parental authority in recent times in this sphere was *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, the Respondent parents, members of an Old Amish community, challenged state compulsory school attendance legislation to the age of sixteen years. It was argued that to compel attendance beyond the age of fourteen contravened their religious beliefs. Secondary schooling was perceived to expose Amish children to a worldly influence in conflict with their religious beliefs, and that impermissible exposure led to higher rates of defection from the Society, which seriously jeopardized the Old Amish way of life. The United States Supreme Court held that in order for Wisconsin to compel student attendance, it must appear either that the state did not deny free exercise or that there was a state interest of sufficient magnitude to override the free exercise provision. It went on to find that an infringement did indeed exist.

> The conclusion is inescapable that secondary schooling, by exposing children to worldly influences in terms of attitudes, goals and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practices of the Amish faith, both as to the parent and the child (p. 1534).

It is significant that the majority of the court effectively equated children's interests in the matter with parents' interests and so, practically speaking, children's interests were subsumed by parental rights. In fact, although the majority referred to the religious rights of the child, and identified these with parental rights, the court then rejected the need to address the issue of children's unique interests at all.

> Contrary to the suggestion of the dissenting opinion of Mr. Justice Douglas, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation (p. 1541).

In other words, the court refused to consider children's rights in a context where the *future of children* rested at the centre of the controversy. I suspect that this procedural judgment was made, primarily as a policy decision to defer to the rights of parents. The refusal to consider children's rights because they were not parties to the litigation stands in blatant contrast to *Pierce v. The Society of Sisters* where the case was decided on the question of parental rights, although parents were not parties to the litigation.

The primary argument the court felt compelled to address in *Wisconsin v. Yoder* was that of the state's interest in the education of the young. While ultimately finding in favour of the Amish parents, the Court nevertheless recognized a state interest in education.

> The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions (p. 1536).

The state's interest, it was held, was adequately served by the eight years of education received by all Amish children, particularly in view of the isolated agrarian way of life for which their community prepared them.

Although the ruling is not a clear repudiation of the child's right to an education for open-mindedness, by refusing to address that issue, the Court effectively crowned the parental right to direct the education of one's child. The child's own interest in personal autonomy was overlooked entirely and the Court's vision of citizenship education was a niggardly one indeed where children were prepared to be citizens of only one small community, isolated from the rest of society, and where the ideal of good citizenship rests solely upon tradition and conformity. By deliberately limiting the exposure of Amish children to non-controversial ideas and by stifling their critical faculties, the United States Supreme Court may have suited them for lives in the Amish community, but for nothing else. These children will be ill-equipped not just to *be* autonomous persons and citizens, but also to realize that there are options which they might choose to embrace or reject for their own lives. Implicit in the judgment of the majority is the idea that parents have the authority to foreclose those choices for their children. I contend that the kind of education upheld by the United States Supreme Court in *Wisconsin v. Yoder* denies the right to an education for open-mindedness and as such fails to recognize the interests of children on two counts. Firstly, it forecloses the possibility of choosing to lead the autonomous life. Secondly, it inadequately prepares Amish children to participate fully as citizens of liberal democracy by equipping them to distinguish the burdens of judgment.

Wisconsin v. Yoder may be explained, in part, by the court's sympathetic view of Amish communities as a valuable and worthy way of life, and to have decided otherwise would have seriously jeopardized the future of the Amish. From this point of view, the decision is less a rejection of children's rights than it is an affirmation of Amish society. Canadian courts are not immune to this same sympathy. In the case of *R. v. Wiebe*, [1978] 3 W.W.R. 36 (Alta. Prov. Ct.), for example, a number of Mennonite parents had been charged with failing to ensure that their children attend an approved public school. Wiebe, along with other parents, had withdrawn his children from public school because the school allegedly taught values inconsistent with his religious beliefs. His son was placed in a private school which had not been approved by the Minister. In deciding the case, the Alberta Provincial Court did not need to take the bold step of asserting that the parental right to freedom of religion under the Bill of Rights trumped the child's right to an education, nor that the parental right defeated the state's interest. Rather, it attacked the procedural aspect of the legislation which usurped the power of the courts to review the Minister's decisions and to thus offer recourse to a plaintiff who was denied approval to establish a private school. Judge Oliver stated:

> In my view there exists a plethora of evidence not only of deep religious convictions sincerely held by the accused concerning the manner in which his child should be educated, but also an unshakable determination to educate his child in accordance with his religious beliefs. The law of Alberta would *without first permitting him recourse to the courts*, penalize him for this on the basis of absolute liability (italics original)(p. 62).

This case may be contrasted, however, with *R. v. Prepolkin* (1957), 23 W.W.R. 592 (B.C.C.A.), a case similarly argued on the basis of freedom of religion. The accused parents were Dukhobour, and the court was less sympathetic to their concerns. Historically, then, the courts have strongly supported parental self-regarding rights in the context of the education of children.

Jones v. The Queen, [1986] 2 S.C.R. 284 (S.C.C.) is arguably the most important education case to have come before Canadian courts since the birth of the *Charter*. Jones, the pastor of a fundamentalist church, educated his three children and others in a schooling program operated in the church basement. He refused to send his children to public school as required by the Alberta *School Act* and also refused to seek an exemption under the Act which would excuse his children from attending a public school if the Department of Education certified that they were receiving efficient instruction elsewhere or that they were attending an approved private school. Jones was charged with three counts of truancy. He invoked sections 2(a) and 7 of the Charter, and maintained that both the requirement that he send his children to public school and the requirement that he alternatively seek an exemption contravened his religious beliefs that God, rather than the Government, had the final authority over the education of his children, and deprived him of his liberty to educate his children as he pleased contrary to the principles of fundamental justice.

Section 7 of the Canadian Charter of Rights and Freedoms reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 2 reads as follows:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

On the issue of parental freedom of religion under section 2(a), Justice Wilson held (concurred with on this issue by Beetz, McIntyre and LeDain JJ.) that the *School Act* does not offend religious freedom, but, rather, accommodates it.

> It does not, in my view, offend the appellant's freedom of religion that he is required under the statute to recognize a secular role for the school authorities. And this is what it is. It would be strange indeed if, just because a school had a religious approach to education, it was free from inspection by those whose responsibility it was to ensure that the standards of secular education set by the Province were being met…There are many institutions in our society which have both a civil and a religious aspect, e.g. marriage. A person's belief in the religious aspect does not free him from his obligation to comply with the civil aspect…[T]he appellant argues that the true purpose of the impugned legislation is to give the School Board absolute control over the education of children. This is clearly without merit. The legislation itself contemplates exemptions for the very thing the appellant is doing (pp. 312-313).

She concluded that "Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view a breach of freedom of religion" (p. 313).

Although Justice Wilson did not elaborate on what the civil aspect of education might entail, she was firmly enough persuaded of its merit as well as of the ample accommodation of religious diversity to conclude that the effect on religion is so minimal as not even to surmount the first constitutional hurdle. In her view, this case did not even make it to the stage of section one analysis where the state must show that the constitutional infringement is demonstrably justified in a free and democratic society.

> To state that any legislation which has an effect on religion, no matter how minimal, violates the religious guarantee 'would radically restrict the operating latitude of the legislature (*Braunfield v. Brown* at p. 606.' It is, of course, clearly arguable that under our constitution this kind of concern should be dealt with under s. 1 of our Charter rather than s. 2. However, as I stated in *Operation Dismantle Inc. v. The Queen,* [1985] 1 S.C.R. 441 at p. 489
>
> > 'The rights under the Charter not being absolute, their context or scope must be discerned quite apart from any limitation sought to be imposed by the government under s.1 (p. 314).'

This is an important pronouncement on the scope of parental rights in education: while not defining the state's interest, it is unequivocal that parents' authority in educational matters is circumscribed by the civil purpose of education, to the extent that grievances of marginal infringements of parents' self-regarding religious rights will not even be entertained in constitutional analysis.

The opinion of the minority on this point does not depart radically from Justice Wilson's judgment. The difference is more procedural than substantive. Per Dickson C.J., Lamer and La Forest JJ., the effect of the *School Act* constituted some interference with the appellant's freedom of religion under s. 2(a), but the impugned provisions of the Act did not offend s. 2(a) as the infringement could be demonstrably justified in a free and democratic society under s.1. This view adopts a less restrictive approach in recognizing *prima facie* parental rights and relies more on s. 1 to accomplish the work of sorting through the impact of the infringement and calling on the state to justify that infringement. In *Jones*, the Supreme Court of Canada commented on the extent of parental liberty rights in this context under s. 7 of the Charter. I will address in a moment, the judicial debate concerning whether the liberty of s. 7 is restricted to physical liberty or whether it is more properly broadly defined such that it embraces certain autonomous interests of persons. Justice Wilson stood alone on this issue affirmatively asserting that s. 7 protects certain parental rights in education.

> [W]hile I accept the appellant's submission that the liberty interest under s. 7 includes the right to bring up and educate one's children, I do not agree with him that it is the right to bring up and educate one's children 'as one sees fit.' I believe that is too extravagant a claim. He has the right, I believe, to raise his children in accordance with his conscientious beliefs (p. 319).

She would have allowed the appeal, not because the appellant's right to educate his children in accordance with his conscientious beliefs had been infringed, but because procedurally, the appellant had been deprived of that right without a fair hearing required by the principles of fundamental justice. The *School Act* did not give the appellant adequate opportunity to state his case by bringing evidence before the Court to review whether the requirement of efficient instruction was indeed being met. The majority, on the other hand, sidestepped the issue. Chief Justice Dickson (writing for the remainder of the Court on this point) stated:

> I find it unnecessary to deal with the appellant's contention regarding the meaning of liberty, because, in my view, even assuming that liberty as used in s. 7 does include the right of parents to educate their children as they see fit, he has not been deprived of that liberty in a manner that violates s. 7 of the Charter (p. 302).

While one would have expected the court to determine whether parents had any rights in respect of the education of their children before deciding whether the parent was deprived of this right in accordance with the principles of fundamental justice, the Court approached the issue backwards in order to dispose of the appellant's argument. This would seem to signal an ambivalence on the part of the Court either concerning the issue of whether it is appropriate to interpret liberty so expansively, or concerning the merit of granting parents any extensive rights in directing the education of their children. Those issues will have to be resolved another day. In any event, it is clear that the Supreme Court of Canada was not prepared to capitulate to the argument for a broad parental right to direct the education of one's child insofar as this concerns the parents' self-regarding rights. This signals the move away from the traditional position which granted wide latitude to determine the education of their children. Just how far these rights have been eroded is still unsure, although clues can be gleaned from other cases and legal trends.

The State Interest in the Education of Children

It is interesting to note that, initially, parental rights were challenged not on the basis that children's rights were being infringed, but rather, that granting excessive authority to parents would compromise the state's interest in educating the young. The argument was made in chapter two that the satisfactory function of a liberal democratic state will depend upon a citizenry capable of comprehending the issues that face it and of effecting meaningful change through civic responsibilities such as voting, public debate and so on. The process of collective decision-making will demand of citizens, if they are to treat other citizens justly, that they be capable of distinguishing the burdens of judgment. While admittedly this is an argument for a robust civic education, courts have already embraced the notion of the state interest in education to lesser or greater degrees.

In *Spence v. Bailey,* 325 F. Supp. 601 (1971); aff'd 465 F. 2d 796 (1972), the court's reasoning was similar to that of the United States Supreme Court in *Wisconsin v. Yoder,* which had recognized the state's interest in education. Memphis Central High School student John Spence had refused on religious grounds, to take the ROTC course required of all male students. Consequently, the school refused to award Spence his high school diploma. The trial court held that the school's action "forced John to choose between following his religious beliefs and forfeiting his diploma on the one hand, and abandoning his religious beliefs and receiving his diploma on the other" (p. 603). Affirming this judgment on appeal, Mr. Justice Clark added that the "state may not put its citizens to such a Hobson's choice…without showing a 'compelling state interest,'" and that the state had been unable to show that it had such an interest in that case (p. 799). While parental rights were not directly implicated in this case, it demonstrates the deference to state interest and suggests that this may defeat the religious rights of the plaintiff.

In *Moody v. Cronin,* 484 F. Supp. 270 (1979), another American case, William Moody and Wesley Ates, members of the United Pentecostal Church, sought to have their children exempted from coeducational physical education classes, alleging that interaction with members of the opposite sex who were wearing 'immodest attire' violated the tenets of their faith. Their request was denied. One child was suspended and Wesley Ates was advised that his son would be unable to graduate unless he took the course in question (p. 273). The parents filed suit. Weighing against the infringement the interest asserted by the state, the court found the First Amendment right of religious freedom "to be of greater importance than the state's interest in physical education" (p. 227).

It is important to note that the court counterweighed the state's interest in the challenged portion of the curriculum, rather than in education generally. The court also commented on how the state's interests could be met by less invasive means. It also bears comment that these cases have dealt primarily with challenges to the curriculum which do not relate to the education of open-mindedness. Indeed, they addressed curricular concerns relating to dance and physical education. The question, of course, is the weight the state interest will pull when issues more central to citizenship come to light.

Rather than being embedded in case law, the test the state must meet to justify infringements on *Charter* rights is made explicit in section 1:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Chief Justice Dickson's concurring opinion in the case of *Jones v. The Queen* is valuable to us in its explicit treatment of the idea of the state's interest in education.

> If the appellant has an interest in, and a religious conviction that he must provide for the education of his children, it should not be forgotten that the state, too, has an interest in the education of its citizens. Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society (p. 293).

He went on to quote with approval a passage from *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 493:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Chief Justice Dickson concluded:

> The interest of the province in the education of the young is thus compelling. It should require no further demonstration that it may, in advancing this interest, place reasonable limits on the freedom of those who, like the appellant, believe that they should themselves attend to the education of their children and to do so in conformity with their religious convictions (p. 298).

It was justifiable, then, for the Province to require a person giving instruction at home to be certified by the School Board as providing efficient instruction. This is a legitimate legislative scheme to assure a reasonable standard of education (p. 299). Emerging from the case is a strong support for the civic ends of education. While the case did not deal specifically with an education for open-mindedness, the Supreme Court of Canada's commitment to the state's interest in civic education would be unwavering. The question, of course, will be whether the education for open-mindedness described in chapter five will be seen as a reasonable limit upon the rights of parents.

The American case of *Mozert v. Hawkins County Public Schools,* 827 F. 2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988) is illustrative of both the importance the court might place on citizenship education as well as what an education tailored by parents, particularly religious ones, might look like. In that case, the Hawkins County School Board had voted to eliminate all alternative reading programs and to require every student in the public schools to attend classes using the Holt reading series. The plaintiff parents and school children asserted that they had sincere religious beliefs which were contrary to the values taught or inculcated by the reading textbooks and that it was a violation of the religious beliefs and convictions of the students to be required to read the books and a violation of the religious beliefs of the parents to permit their children to read the books. It is worthwhile to quote extensively from the judgment of Chief Judge Lively to get a clear understanding of the objections to the series expressed by the various parent witnesses.

> Vicki Frost was the first witness for the plaintiffs and she presented the most complete explanation of the plaintiff's position. The plaintiffs do not belong to a single church or denomination, but all consider themselves born again Christians. Mrs. Frost testified that the word of God as found in the Christian Bible "is the totality of my beliefs." There was evidence that other members of their churches, and even their pastors do not agree with their position in this case.
>
> Mrs. Frost testified that she had spent more than 200 hours reviewing the Holt series and had found numerous passages that offended her religious beliefs. She stated that the offending materials fell into seventeen categories which she listed. These ranged from such familiar concerns of fundamentalist Christians as evolution and 'secular humanism' to less familiar themes such as 'futuristic supernaturalism,' pacifism, magic and false views of death.
>
> In her lengthy testimony Mrs. Frost identified passages from stories and poems used in the Holt series that fell into each category. Illustrative is her first category, futuristic supernaturalism, which she defined as teaching 'Man As God.' Passages that she found offensive described Leonardo da Vinci as the human with a creative mind that "came closest to the divine touch." Similarly, she felt that a passage entitled "Seeing Beneath the Surface" related to an occult theme, by describing the use of imagination as a vehicle for seeing things not discernible through our physical eyes. She interpreted a poem, "Look at Anything," as presenting the idea that by using imagination a child can become part of anything and thus understand it better. Mrs. Frost testified

> that it is an "occult practice" for children to use imagination beyond the limitation of scriptural authority. She testified that the story that alerted her to the problem with the reading series fell into the category of futuristic supernaturalism. Entitled "A Visit to Mars," the story portrays thought transfer and telepathy in such a way that "it could be considered a scientific concept," according to this witness. This theme appears in the testimony of several witnesses, i.e., the materials objected to "could" be interpreted in a manner repugnant to their religious beliefs.
>
> Mrs. Frost described objectionable passages from other categories in much the same way. Describing evolution as a teaching that there is no God, she identified 24 passages that she considered to have evolution as a theme. She admitted that the textbooks contained a disclaimer that evolution is a theory, not a proven scientific fact. Nevertheless, she felt that references to evolution were so pervasive and presented in such a factual manner as to render the disclaimer meaningless. After describing her objection to passages that encourage children to make moral judgments about whether it is right or wrong to kill animals, the witness stated, "I thought they would be learning to read, to have good English and grammar, and to be able to do other subject work." Asked by plaintiff's attorney to define her objection to the text books, Mrs. Frost replied:
>
>> Very basically, I object to the Holt, Rhinehart [sic] Winston series as a whole, what the message is as a whole. There are some contents which are objectionable by themselves, but my most withstanding [sic] objection would be to the series as a whole.
>
> Another witness for the plaintiffs was Bob Mozert…He also found objectionable passages in the readers that dealt with magic, role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes, and emphasis on one world or a planetary society. Both witnesses testified under cross-examination that the plaintiff parents objected to passages that expose their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones (pp. 1061-1062).

The three member court was unanimous in rejecting the claim, but each for different reasons. Chief Judge Lively espoused a moderate view, taking as a starting point for his analysis the question of whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment. Chief Judge Lively differentiated between exposure to ideas and compulsion to affirm them.

> Proof that an objecting student was *required* to participate beyond reading and discussing assigned materials or was disciplined for disputing assigned materials might well implicate the Free Exercise Clause because the element of compulsion might then be present. But this was not the case either as pled or proved. The record leaves no doubt the district court correctly viewed this case as one involving exposure to repugnant ideas and themes as presented by the Holt series (p. 1064).

That being so, Chief Judge Lively held that no unconstitutional burden on the students' free exercise of religion had been established. He reiterated the principle articulated in *Bethel School District No. 403 v. Fraser* 478 U.S. 675 106 S. Ct. 3159, 3164, 92 L. Ed. 2d 549 (1986) that public schools serve the purpose of teaching fundamental values "essential to a democratic society." These values "include tolerance of divergent political and religious views while taking into account "consideration of the sensibilities of others." The critical reading approach which rested on exposure to diverse ideas furthered these goals. It did not necessitate acceptance of other views, but required a civil tolerance if not a religious one.

Judge Kennedy accepted Chief Judge Lively's analysis and concurred in his opinion, but went further to say that *even* if requiring the use of the Holt series constituted a burden on the plaintiffs' free exercise rights, she would find a compelling state interest. Judge Kennedy accepted the state's stated principal objective of critical thinking as essential to citizenship.

> Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits of manners and civility.

> The evidence at trial demonstrated that mandatory participation in reading classes using the Holt series or some similar readers is essential to accomplish this compelling interest and that this interest could not be achieved any other way. Several witnesses for appellants testified that in order to develop critical reading skills, and therefore achieve appellants' objectives, the students must read and discuss complex, morally and socially difficult issues (p. 1071).

Although Judge Kennedy recognized that these will often conflict with the religious views of the parents, she accepted this as a necessary consequence, since accommodating the parents' beliefs would unduly interfere with the fulfillment of the state's legitimate objectives. She also recognized compelling state interests in avoiding disruption in the classroom (p. 1071), and in avoiding religious divisiveness (p. 1072), although these appear to be subsidiary objectives instrumental to achieving the state's primary interest in education: preparing students for citizenship and self-government. In his opinion, which concurred in the result, Judge Boggs rejected Judge Kennedy's finding of a compelling state interest. This, however, reflected more a divergence of opinion as to the empirical necessity of critical reading than anything else. He, too, adopted the test of compelling state interest.

Indeed, while Judge Kennedy's reasons are silent in respect of children's rights, her reasons correspond quite tidily to that prong of my argument which sees autonomic capacities emerge from the necessity of a robust civic education. Open-mindedness is not explicitly identified as a state interest, yet it is clear that the kind of education for which Judge Kennedy argues is predicated upon its development. This is also evident not only from the objectives she identifies, but also from the *process* she views as being necessary to its achievement. That is, if a child is to learn about complex social and moral issues, a child must come face to face with not only complex, but difficult social and moral issues. Clearly, if one is to give such issues their intellectual due, one must approach them in an open-minded fashion. To do otherwise would be to avoid those issues, not to confront them legitimately.

Children as Constitutional Rights Holders

Jones sends a clear message that parental rights, and in particular, religious rights, relating to the education of one's children are severely limited by the corresponding state interest in the education of its citizens. Interestingly, though, the case is conspicuously silent on the issue of the self-regarding rights of students and how these will impact on any decisions surrounding their education. This may be so because it was unnecessary to take the analysis to that level. The state's interest was sufficient in itself to rebut parental rights in this instance.

The courts have signaled their preparedness to examine constitutional infringements in the area of education. But will that willingness extend to intervention on behalf of students? Historically, children were largely disenfranchised as eligible rights-holders. This makes sense when one considers the patriarchal roots of the North American family. What rights a child might have had were exercised paternalistically by the male head of the household.[3] In fact, the parental right to raise the child as he saw fit essentially obfuscated any rights which might have inhered in the child. The feminist movement severely weakened the underpinnings of patriarchal society, yet the last bastion of patriarchal dominance, parental dominion over one's child, was slow to succumb to stress fractures. It is only within the last several decades that the child's innate impotence has been construed not as an invitation to domination, but as a reason to act in the child's best interests *out of respect for her rights*.

Section 15 of the *Charter* explicitly provides that every individual has the right to the equal protection and benefit of the law without discrimination based on age. Children and students are thus invited to share in the inheritance of rights bequeathed in the *Canadian Charter of Rights and Freedoms*. The question, of course, will be whether the entitlements of children will be coextensive with those of adults. Because there are morally relevant differences between children and adults, it would not be unreasonable to expect that the protection of a particular right may be manifested differently in view of the status of the right-holder. The framers of the *Charter* were certainly alive to differences in status when they qualified s. 15 by providing for the possibility of affirmative action programs for identified disadvantaged individuals or groups. It would seem to be consistent with the spirit of the *Charter* not to insist that courts remain status-blind in their constitutional adjudications.

In the United States, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 83 (1969) is the seminal case on free speech in American schools. In that case, the United States Supreme Court upheld the right of several high school students to wear black armbands as a symbolic protest against the war in Vietnam. Mr. Justice Fortas, speaking on behalf of the majority stated:

> First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate (p. 737).

The burgeoning recognition of children's rights in Canada has had a significant impact on shaping parental rights, by first holding them in check, and then by gradually forcing them to retreat. While Canadian case law to support this claim in the area of education is sparse, the phenomenon is evident in other domains. The trend is perhaps most striking where apprehension of a child in neglect cases is at stake.

In *Re R.K.* (1987), 79 A.R. 140 (Alta. Prov. Ct., Fam. Div), provincial authorities applied under s. 29 of the *Child Welfare Act* for the temporary guardianship of a sixteen weeks premature infant, to enable the child to receive blood transfusions. The child's parents objected on religious grounds to the procedure. Recognizing that no religious beliefs could yet be attributed to the child given his tender years, Judge Russell (now of the Alberta Court of Appeal) held that the parents' freedom of religion must be balanced with competing interests, and concluded that the parents' freedom of religion is not paramount to the child's right to life or quality of life (p. 146). In following *Jones v. The Queen*, she stated that the interests of the state in protecting children presents an even more compelling argument to place some limits on the expression of religious freedom (p. 146). She rejected the parents' argument under s. 7 that their liberty in making decisions concerning the child were violated in a similar fashion. "The child's right to life under that section," she writes, "may not be subsumed to the rights of the parents' liberty to make decisions concerning that child" (p. 146).

Of course, in many cases, children will not be adequately equipped to exercise their own rights. Someone will be justified in acting paternalistically for the child. The question will be the parameters of the paternalistic function. In the previous chapter, I argued that the enabling rights of parents to act on behalf of their children cannot be extended to the point that they undermine the very reasons for those rights. I also argued that where children's rights come into conflict with the self-regarding rights of parents (such as the free exercise of religion), our concession to the morally egalitarian nature of parents and children compels us to resolve the conflict in favour of that right which is most integral to autonomy. The court's forays into such conflicts would seem to be supportive of these principles. In *Re M (L and K)* (1978), 7 Alta L.R. (2d) 220 (Juv. Ct.), a pre-Charter case, the court wrestled with the issue of the custody of two children whose parents had been members of a religious cult. The Director of Child Welfare applied for custody of the children as neglected children. The Court held that such cases invariably begin with the legal premise and concern, *what is in the best interests of the child* (p. 234).

> It is the prime responsibility of the court to consider the child's needs first and yet at the same time not put aside the thought of holding the family unit together; and the court should also protect the legal rights of the parents (p. 234).

In attempting to maintain custody, the father argued freedom of religion under the *Charter's* predecessor, the Bill of Rights. In finding that the concern for children's upbringing is society's major concern, the court held that religious freedom steps over its bounds when it creates an atmosphere which is not conducive to allowing a child to reach his potential on an individual basis. Not only did the court recognize the child's best interests as the paramount factor, but it expressed the movement to regard emotional and mental neglect as legitimate grounds for the apprehension of children. Traditionally, neglect and abuse have been viewed in their physical ramifications alone.

> The law…has always been reluctant to recognize non-physical injury as a genuine cause of action. Emotional injury of a child may result from trauma or from an improper biological or psychological environment. Naturally, legislatures and courts are hesitant to include in the formulation or interpretation of criminal or civil statutes the type of harm which is either non-observable or extremely difficult to demonstrate and prove. Another problem for the legal recognition of psychological injury is that the medical or behavioural consequences of such abuse may not become manifest until the passage of a certain amount of time. Nevertheless, the trend is clearly toward recognizing emotional or psychological harm to a child as a legal entity (p. 238).

I think this trend has enormous significance for judicial law-making in all areas whose chief concern is the development and welfare of the child. It suggests, firstly, that the benchmark for these cases will be the best interests of the child and, secondly, that this is to be determined holistically with a view to the child's physical, emotional and cognitive welfare. It suggests that parental rights will certainly play a part, but *because these decisions primarily affect the child*, their children's interests will be the more significant factor.

The relevance to educational cases is clear. If education is viewed primarily as a process whose end it is to develop and benefit the child, then the child's best interests will be paramount. This legal view will corroborate the theoretical conclusions reached in chapter six which explored the moral rights of parents and children. Furthermore, the door has been opened to consider the child's emotional and mental well-being, in the area of education as in the area of neglect. As the necessary pre-cursor to personal autonomy and civic virtue, the virtue of open-mindedness must figure prominently in the deliberations of any court attempting to square the religious convictions of parents to the development of curriculum and the materials selected as resources.

The Recognition of Parents' Rights, Children's Rights and State Interest as Significant Factors

That all three interests must be considered in educational cases has not yet been made explicit in Canadian jurisprudence. Canada may take its cue, however, from American case law. The case *Davis v. Page* 385 F. Supp. 395 (1974) suggests the path that might be taken. In that case an action was brought on behalf of elementary school children by their father on the ground that the school board's policy requiring students to remain in the same classroom where religiously offensive activities were taking place as part of the school program violated their rights guaranteed by the First Amendment and the parents' inherent right to control the moral and religious development of their children. The plaintiffs were members of the Apostolic Lutheran faith, and the dogma of their faith made it sinful to watch television and movies, view audio-visual projections, listen to the radio, engage in play acting, sing or dance to worldly music, study evolution, study 'humanist' philosophy, partake in sexually oriented teaching programs, openly discuss personal and family matters and receive the advice of secular guidance counselors. Under the new school board policy, students were not permitted to leave the classroom if the activities offended their religious beliefs, but were given the option of turning their chairs away, placing their heads on their desk, or standing at the back of the classroom.

The court observed that the interests of the children are not co-terminus with that of their parents and that it would be naïve for the court not to recognize that the children's asserted freedom of exercise of religion was, in essence, that of their parents.

> In fact, the freedom asserted is the right of the parents to inculcate and mold their children's religious beliefs to conform to their own without the children being subjected to school programs and materials which the parents deem offensive and subversive of these beliefs (p. 398).

The court acknowledged that the parents' rights must be balanced against the state's interest as expressed in *Wisconsin v. Yoder*. But the analysis is taken one step further.

> The balance is a most precarious one. The parents' right to freely exercise their religion and their inherent right to control the upbringing of their children must be weighed against the state's interest in providing its youth with a proper and enabling education *and the children's right to receive it* (italics mine) (p. 399).

Judge Bownes recalled the words of Chief Justice Warren in *Brown v. Board of Education*, 347 U.S. 483 at 493, wherein he observed that "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Judge Bownes further observed that parents have no constitutional right to deny their children an education (p. 400).

> If these children are allowed to leave the classroom whenever audio-visual equipment is being used, then they will be denied an effective education. The Constitution does not command such a result. A parent because of his own religious preferences is not allowed to make martyrs out of his children (p. 401).

The court later commented that "the First Amendment does not protect all religions from nonsectarian views which are distasteful to them. To allow students and parents to pick and choose which courses they want to attend would create a stratified school structure, where division and derision would flourish" (p. 405). The court concluded that parents' objections go to the heart of the educational process, and that our system of education could not survive if parents were allowed to dictate the courses and modes of study. To grant parents that authority would be a power of disorganizing the school, and practically render it substantially useless (p. 406).

There is a dearth of educational cases which have come before Canada's highest court. Yet trends are discernible in analogous cases from which we can extrapolate the likely direction the court will take in cases like *Davis v. Page* and *Mozert v. Hawkins County*. The recognition of the state's indisputable interest in matters of public policy, and the maturation of thin paternalistic welfare rights for children into strong self-regarding liberties, powers, and immunities will almost certainly be imported into educational cases.

One such case which sets the stage for the legal reification of the child's moral right to an education for open-mindedness is *B [R] v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315. In that case, an infant (S.B.) was born four weeks prematurely and exhibited numerous physical ailments. At one point, the attending physicians believed her life to be imperiled and that she might require a blood transfusion. In these circumstances, the *Child Welfare Act* R.S.O. 1980 outlines the procedures whereby a blood transfusion may be performed without consent of the parents. The appellants challenged the relevant sections of the statute because, as Jehovah's Witnesses, they objected for religious reasons to the procedure. They relied upon sections 7 and 2(a) of the *Charter*, arguing a liberty right to make decisions concerning their child and a right to freedom of religion.

The appeal was dismissed, although several judgments did so for disparate reasons. Justice La Forest wrote for four members of the panel of nine on the issue of

s. 7. He immediately disposed of the notion that s. 7 affords protection to the integrity of the family unit as such. Rather, the *Charter*, and s. 7 in particular, protects individuals and the concept of the integrity of the family itself is premised at least in part, on that parental liberty (p. 363).

While the respondent argued that parental liberty falls outside of the ambit of s. 7 because it is effectively an obligation which is coterminous with the welfare of the child, La Forest is more generous to parents.

> While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately we have distanced ourselves from the ancient juridical conception of children as chattels of their parents)...Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified (p. 372).

La Forest's comments correspond remarkably to the argument pressed in the preceding chapter: That parental rights vis-à-vis their children emanate from both the welfare interests of their children as well as the parents' own self-regarding interests. Those rights, however, must be viewed in tandem and balanced with children's interests, which include the child's health or autonomy. Several points bear emphasis.

Firstly, children's interests are incorporated into the scrutiny of the constitutional claim, *even though they are not parties to the action*, contra *Yoder*. Secondly, while this case dealt with a situation where the life of an infant was at stake, the recognition by La Forest of parents' autonomic interests in the matter compelled him to recognize the parallel autonomic interest of children (and not only the right to life). Thus, in sorting out the respective rights in the parent/child relationship, one must be mindful that both parties have autonomic interests captured by the liberty right of s. 7. This will not mean that every pressure exerted on the autonomic interests of children will trigger state intervention. La Forest conceded that because of the multitude of decisions parents must make each day concerning their children, "we must accept that parents can, at times, make decisions contrary to their children's wishes – and rights – as long as they do not exceed the threshold dictated by public policy, in its broad conception" (p. 373). For example, parents must be given the latitude to decide where the family shall live, and which school the child will attend.

Having accepted that parents have a liberty interest, the balancing of children's and parents' rights is to be done in the course of determining whether state interventions are in conformity with the principles of fundamental justice (p. 374). In this case, La Forest was satisfied that the scheme under the *Child Welfare Act* was in accordance with those principles. Similarly, La Forest acknowledged the right to freedom of religion and, relying on *Jones v. The Queen*, observed that this right includes the right of parents to rear their children according to their religious beliefs. That right, however, is not absolute, and may be subject to such limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (p. 383). In this case, the life of the child was clearly paramount to the parents' rights to make medical decisions concerning their child, in accordance with their religious beliefs.

Justices Iacobucci and Major, writing as well for Cory J., are even less sympathetic to parental rights in this case. Indeed, they disagree with La Forest's analysis which relies upon s. 1 and the principles of fundamental justice in s. 7 in order to establish the constitutionality of the *Child Welfare Act*. The appellants, in their view, did not even cross the first threshold of Charter analysis by establishing a *prima facie* right in these circumstances. Their concern was that La Forest's decision "creates a situation in which the child's right to life or security of the person is reduced to a limitation on the parents' constitutionally protected ability to deny that child the necessities of life owing to parental liberty and freedom of religion" (p. 430). As such, they countenanced no parental right to deny a child medical treatment that has been adjudged necessary by a medical professional.

However, they distinguished the parents' rights where the right to life and security of the child is implicated versus the case, as in *Jones v. The Queen*, where the matter involves the child's education. Sopinka J., while concurring with La Forest J. on the issue of s. 2(a), was of a similar view with regards to s. 7. That is, the parents do not meet the threshold for subsequent constitutional analysis. It would seem, then, that in a case concerning the education of children, the court could well be unanimous that the parents have a *prima facie* right under ss. 7 and 2(a) to direct the education of their children, but that the child's self-regarding interests, including having access to the autonomous life, may well be paramount. Parents may have self-regarding rights, but it is unlikely that the court will lose sight of the fact that education is, at its core, an activity which fundamentally cleaves to the child. If the court remains consistent in the application of its assertions that "freedom of religion should not encompass activities that so categorically negated the freedom of conscience of another" (p. 437) and that religious freedom be upheld only to the extent "that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M Drug Mart* [1985] 1 S.C.R. 315 at p. 347), then these principles, coupled with the burgeoning recognition of children's rights comprise a powerful argument postulating the right to an education for open-mindedness.

I do not wish to be understood as advocating for the elimination of parental rights vis-à-vis their children. While I am convinced that the right to an education for open-mindedness should defeat contrary claims forwarded by parents, the process of balancing is always a delicate one, and school boards must take care to accommodate these parental rights as much as possible without sacrificing their mandate. Indeed, the courts will demand it. In *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.), the Supreme Court of Canada declared that "the onus of proving that a limit or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation" (p. 225). In other words, if the state, in the form of school boards, wishes to pass curricular guidelines which infringe parental rights, it must justify that infringement, even if its purpose is to serve the best interests of children. Two central criteria must be satisfied in a s. 1 analysis. First, the objective which the restrictive measures serve must be of sufficient importance to warrant overriding a constitutionally protected freedom; and secondly, the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified (p. 227). In turn, the second criterion involves a proportionality test with three significant components. The first branch requires that the measures adopted be carefully designed to achieve the objective in question and must not be arbitrary, unfair, or irrational. Secondly, the measures or means must impair as little as possible the right or freedom in question. Finally, there must be a proportionality between the effects of the restrictive measure and the objective of great importance. The more severe the deleterious effects of a measure, the more important the objective must be (p. 227).

As concerns the balancing test between state, parents and children in s. 7, and as concerns the state's actions to intervene on behalf of the child, *Re V.B.* (1985), B.C.W.L.D. 3106 (Yuk. Terr. Ct.) provides a clear summary.

> State power or actions manifesting the following characteristics violate the principles of fundamental justice:
>
> i) any interference with parents and children that exceeds the proven need to protect the well-being of the child is unconstitutional;
> ii) any inflexible statutory provision precluding the court from tempering state interference to the minimal degree warranted by the circumstances in each case, violates the constitutional rights of children and parents;
> iii) any legislative scheme creating a discretionary power to limit constitutional rights must allow for the discretionary decision to be exercised in accord with the principles of natural justice.

It is alarmist, I think, to regard the delivery of an education for open-mindedness as the first incursion into parental rights which must inevitably lead to the complete denial of parental rights to raise their children. Indeed, the system of checks and balances as articulated by the courts is designed precisely to avert that kind of result. Although it might seem that children's rights are threatening to oust parental rights, the argument I make advocates no more than moral parity between children and adults. Perhaps it is simply the long-standing subordination of children which makes even this morally solid position appear to be so menacing.

The Right to an Education

To this point, we have established that the Canadian judiciary has shown a willingness to intervene in appropriate educational matters. While parents have both enabling and self-regarding rights to direct the education of their children, the courts have recognized that state intervention may be necessary to protect the state's interest in education and to ensure that children's own self-regarding rights are secure. The trends are promising for the kind of argument I am making. Yet a significant hurdle must be overcome as it is central to this legal theory. Does the child have a right to an education? Naturally, if no right to an education *tout court* can be found, the struggle to realize the right to an education for open-mindedness will be in vain.

It would seem that I have found an ally for my argument that moral rights which reflect vital interests of persons are the impetus for ascribing legal rights in Wayne MacKay, who writes in his book *Education Law in Canada*,

> Declaring education to be a right is merely asserting that it is sufficiently important in both a practical and philosophical sense to be accorded legal protection. The argument that education is a right because it receives legal protection is a circular one (1984, p. 35).

My goal is to unearth the legal right to an education which could then give me sufficient momentum to argue for a legal right to an education for open-mindedness.

MacKay describes legal rights as the progeny of various sources. Statutory rights are created by legislation, but are vulnerable in that they can be revoked as easily as they are created by legislation. Common law rights are those embodied in the common law, but are equally susceptible to simply being overturned by new judge-made law in response to the evolving legal culture. Constitutional rights are most valuable because they prevail over other kinds of rights and because they are more difficult to change than statutory and common law rights.

Canada has been a signatory to several declarations of the United Nations which enshrine the right to education. Notable among these is the *Declaration of the Rights of the Child* which states:

> Principle 7
>
> The child is entitled to receive education which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.
>
> The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
>
> The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Similar provisions are found in Article 26 of the *Universal Declaration of Human Rights* and Article No. 2 of the *International Covenant on Economic, Social and Cultural Rights*. But while these instruments might be of some use in the interpretation of domestic legislation, there is no automatic legal recourse for a breach. Canada is bound by international convention to comply with the agreements which it has ratified, but non-compliance has little legal impact.

In Canada, no common law right to an education exists. But if we turn to statutory law, we find that most provinces have enacted legislation pertaining to the education of children. In many cases, there are provisions which allude to the child's right to education, as defined. In some cases, education is not explicitly mentioned – the child's right may be to attend a school within his school district, for example, or to receive appropriate instruction. These rights are typically qualified which suggests education may be more of a privilege than a right. While the respective Acts establish some positive duty on the school board to provide some kind of education, these duties are not conceived as the corollary of a specific right, which allows too much room for movement in defining the services a school board must deliver to children. Questions of existing resources and facilities may become the governing factor in determining the content of an education. Furthermore, the rights that are specified are subject to the nature of statutes: that they can be withdrawn as readily as they were granted. MacKay and Krinke warn:

> [T]here is some danger in assuming that the right to an education derives solely from statute. Statutes are creations of legislatures. If the right to education exists only in these statutes, education may be viewed not as the right of every child, but as a privilege bestowed by the legislature, to be determined by administrators, and to be overseen only as a last resort by the courts…It would be preferable to view education as a basic human right with the legislature providing the mechanism by which the right is exercised. This view of education would attract a more activist stance by the courts, and would allow minority groups, particularly the mentally disabled, greater access to education as well as more input toward determining what is an appropriate education (1987, pp. 73-4)

Furthermore, while a statutory right to an education would be propitious, it is unrealistic to think that provincial legislatures are likely to burden themselves with what might become an onerous obligation. In the thorny area of special need, for example, the right to an education might obligate the province to rethink some of its outmoded policies and to invest accordingly, hardly an appealing task for governments.

MacKay and Krinke suggest that the most logical place to find a constitutional right to education in the Charter is in section 7.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The advantages of constitutional rights are that they are not easily changed, and the Charter provides built-in remedies which include (under s. 24(1)) any remedy that the court sees fit and (under section 52) the authority for the courts to strike down any legislation which is in contravention of the enumerated rights.

Because there is little Canadian jurisprudence on a constitutional right to education, the courts will likely look to the United States first to see if American jurisprudence can offer any guidance. While there is some support for the constitutional right to an education,[4] the United States Supreme Court rejected this claim in *San Antonio Independent School District v. Rodrigues*, 411 U.S. 1 (1973). MacKay and Krinke caution, however, that this should not be definitive of the issue and that there are significant differences between the American and Canadian legal situations (p. 81). First, section 7 of the Charter is worded in a manner which reflects a positive right ("Everyone has the right…"), whereas the wording of the 14th Amendment to the American Constitution is negative:

> No State shall make or enforce any law which shall abridge the privilege of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law…

It might be added that even the First Amendment which protects intellectual liberty is construed negatively:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

MacKay and Krinke suggest that a strong argument can be made that the difference is not mere semantics and that a positive right invites state action (p. 81). Secondly, MacKay and Krinke point to the structural differences between the two documents.

> Lamer J. in *Re s. 94(2) of the Motor Vehicle Act (B.C.)* highlights three differences between the *Charter* and the American Constitution. There is no equivalent of s. 52, the supremacy clause, in the American Constitution. This gives the Canadian courts more authority to be activist. As well, there is no equivalent of s. 33, the override provision. This is especially significant in areas of rights. Once criticism of judicial activism is the possibility of contramajoritarian reform. However, through s. 33, legislatures could alter any judicial reform by 'opting-out.' Finally, the U.S. Constitution has no equivalent for the *Charter's* s. 1, 'reasonable limits' clause. This, too, is significant. With no means of limiting the right, the United States' courts have been reluctant to expand the content of substantive rights (p. 81).

Furthermore, the *Charter* was drafted after Canada had already made an international commitment granting the right to education, and so should be read in this light. Finally, two sections of the *Charter* explicitly mention education. Section 23 protects minority language education and section 29 deals with rights to denominational schools. "To grant a right to be educated in a minority language or separate school, but to refuse to recognize a pre-existing right to education," MacKay and Krinke assert, "would be offering a vehicle but denying roads and destinations" (p. 82).

The Supreme Court of Canada has yet to adopt the argument that a right to an education exists, and that it is shielded under section 7 of the Charter. But this may be more due to want of opportunity than to lack of desire. Indeed, the right to education is not unheard of in Canadian jurisprudence. In *Henchel v. Board of Medicine Hat School Division No. 4*, [1950] 2 W.W.R. 369 (Alta. D.C.), for example, District Court Judge Sissons averred to a general right to an education. The plaintiff parent, a rancher, sued the school board for failing to provide adequate arrangements for the schooling and accommodation of his children who were compelled to attend a school at some distance from their home. The small local population had forced the closing of a rural school. The court considered the pertinent legislation.

> Counsel for the defendant argues that this is not an absolute duty. I think that the duty 'to provide adequate school accommodation for the purposes of the district' is absolute. Even if these sections were not in the Act this primary duty would have to be implied. Children have a right to be educated, and school districts and school divisions have no other reason for existence (p. 372).

Sissons J. went beyond the legislation to extrapolate a more fundamental right to an education, even absent a statutory instrument.

Addressing the issue of the content of the right to an education does more than merely flesh out a right that it is hoped the Supreme Court of Canada will recognize. Describing what that content will be also provides the rationale to accept a right to education in the first place. In chapter six, I made an argument that the kind of liberty to which children have a moral right is positive liberty. It would be a profound error to import judicial interpretations of liberty forged in cases relating to adults to cases where the claimants are children. It must be recalled that the maximization of liberty *per se* is not a satisfactory end in itself. ***The justification of liberty is in its instrumental role in service of autonomy***. What makes liberty an important and even indispensable tool, is that it provides a mechanism by which we can show respect for persons who must hew their own good lives by their own choices, for which we hold them responsible. It is the way we acknowledge that each person has one life to lead, a life in which he has more invested than anyone else and if he is to make a success of things, by his own subjective standards, he must be given the latitude to determine the course of his life. Children require positive nurturing and education which will later enable them to benefit from freedom. Thus, I argued, the moral right to freedom for children ought to be construed as positive liberty, or a welfare right to liberty.

My argument for a right to an education for open-mindedness will fail unless the judiciary is prepared to recognize that the right to liberty is bifurcated, such that while it will sometimes prevent the state from interfering in the lives of its citizens in some spheres, yet in other contexts, it will quite properly place positive obligations on the state to act. MacKay and Kazmierski (1996) are supportive of this view of a welfare right to education and that it is protected by s. 7 of the Charter. MacKay and Krinke acknowledge the reluctance on the part of legal players to forswear an entirely negative view of constitutional liberty. They explain that these recalicitrants have been conditioned by a concept of human rights which arose in the eighteenth century as a reaction to feudal and absolutist states. That ethos was revived post World War II as a reaction to the horrors perpetrated under some state regimes (p. 74). This perspective which viewed the state as the enemy is anachronistic and has not kept pace with the concept of human rights which has expanded to reflect changes in modern day society.

> The Universal Declaration of Human Rights, for instance, has been called 'a synthesis of eighteenth century individualism and nineteenth century socialism.' As such, it more closely resembles the dynamics which have shaped modern Canadian society. Education, commonly referred to as a 'welfare' right, a right which makes claims on the government, fits within this new concept of human rights. If rights are viewed from this new perspective, it seems fitting to talk of a basic right to education (MacKay and Krinke, pp. 74-5).

This view would seem to be consistent with the differences in wording between the eighteenth century American Constitution which champions negative rights, and the *Charter*, which makes room for positive rights. *Because* liberty must be construed in the context of autonomy, to fail to reject an exclusively negative conception of liberty would be tantamount to cutting children out of the legacy of the *Charter*, for *negative liberty does not serve their future autonomy*. Section 15 of the *Charter* prohibits us from doing this.

The conferral of welfare rights upon children is linked as strongly to their future autonomy as is choice to the present autonomy of adults. This is enormously significant. It means that if courts are to recognize a child's right to liberty which is derivative of the vital interest in autonomy, the enterprise of education must be implicated as it is essential to the development of those virtues necessary for autonomous choice. The only meaningful construction of a child's right to liberty in this context will necessarily include the recognition of welfare rights. While some members of the judiciary remain resistant to change in this direction, the Supreme Court of Canada has laid the groundwork which suggests not only that Canada's highest court will be receptive to the notion of a welfare right to education for children, but that legal culture as a whole is evolving in this direction.

In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R., the Supreme Court of Canada held that the interpretation of section 7 should be "a generous rather than a legalistic one (p. 295). Perhaps because of the vagueness of 'liberty' few courts and litigants have embraced the opportunity to expound on its meaning. It has attracted but few intrepid explorers and remains relatively uncharted territory. Justice Bertha Wilson of the Supreme Court of Canada was among the vanguard who made it a project to expand the s.7 notion of liberty outside of the context of the criminal law. In *R. v. Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30, Justice Wilson articulated that the right to liberty guaranteed in the Charter is intimately connected to the concept of human dignity. In her judgment, she quoted Professor Neil MacCormick's view that liberty is

> ...a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life...To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment...If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

After quoting this with approval, she continued:

> [A]n aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty...is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental importance...
>
> To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment.

Justice Wilson has interpreted liberty similarly in other cases.[5] What is interesting is that this case ostensibly dealt with negative rights, but the language of positive rights permeates the decision. In *R. v. Morgentaler, Smoling and Scott*, the court faced the issue of the constitutional validity of legislation purporting to govern and restrict a woman's ability, in consultation with her physician, to make decisions concerning abortion. The *context* of the issue would seem to fall squarely within those cases where non-intervention of the state in private lives was at stake, But the court seized the opportunity to augment the idea of liberty within section 7 to capture the connotation of positive liberty.

In this, Justice Wilson imported American jurisprudence on the Fourteenth Amendment to the United States Constitution which stipulates that no person is to be deprived of liberty without due process of law. Some American courts have generously interpreted that provision as is demonstrated in Justice McReynold's decision in *Meyer v. Nebraska,* 262 U.S. 390 (1923).

> Liberty denotes not merely freedom from bodily restraint, but also the right to the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (p. 399).

More importantly, the language of positive rights has already crept into educational law in the case of *Jones v. The Queen*. Both the majority and minority opinions quoted the excerpt above from *Meyer v. Nebraska* with approval, when searching for a definition of liberty. While the majority did not elaborate on the meaning of liberty, nor did they reject the broad definition. Justice Wilson, in her minority opinion, concluded:

> I believe that the framers of the Constitution in guaranteeing 'liberty' as a fundamental value in a free and democratic society, had in mind the freedom of the individual to develop and realize his potential to the full, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric – to be, in today's parlance, 'his own person' and accountable as such (p. 318).

The Canadian reception to the American interpretation has been mixed. On the one hand, jurists of Justice Wilson's ilk have embraced, while others have sought to curtail this generous interpretation and to limit the scope of 'liberty' to the context of physical restraint. This split is perhaps no more evident than in *B. (R) v. Children's Aid* [1995] 1 S.C.R. 313. In that case, the Supreme Court of Canada considered the issue of parental liberty vis-à-vis their children. Most of the members of the Court either expressly or implicitly followed an approach analogous to that previously posited by Justice Wilson, wherein liberty was construed broadly. Chief Justice Lamer (although agreeing in the results of the appeal) disagreed with the reasons of both Laforest J., and Iacobucci and Major JJ. as they related to s. 7. Despite the similarities in wording between s. 7 and the Fourteenth Amendment, Chief Justice Lamer rejected the adoption of American jurisprudence on this issue because American law evolved in its own unique context and, in particular, without the benefit of s. 1 of the *Charter* and s. 52 of the *Constitution Act*, 1982. Section 1 subjects the rights and freedoms articulated in the *Charter* to reasonable limits prescribed by law as can be justified in a free and democratic society. Section 52 nullifies the force and effect of any law which is inconsistent with the provisions of the *Charter*. Chief Justice Lamer was not prepared to recognize that by including the 'right to liberty' in s. 7, the framers of the

Constitution intended to protect liberty in its broadest sense. Freedoms in that sense are specified in s. 2, whereas s. 7 refers to rights. Indeed, Chief Justice Lamer was of the view that the right to liberty under s.7 was confined to physical liberty as that is the only kind of liberty to which the principles of fundamental justice could be made relevant.

> Since the principles of fundamental justice are elements that are essentially within the domain of the justice system, the type of liberty s. 7 refers to must be the liberty that may be taken away or limited by a court or by another agency on which the state confers a coercive power to enforce the laws. In other words, s. 7 actively engages the principles of fundamental justice and demands that the state respect them when it intends to infringe on the right to life, liberty or security of the person (p. 340).

In support of this argument, Chief Justice Lamer points to the close connection between ss. 8 to 14 and s. 7, in that they deal with specific infringements of the rights to life, liberty and security of the person which offend the principles of fundamental justice and which therefore violate s. 7. These specific sections relate closely to aspects of the criminal justice process. As well, these sections appear jointly under the heading 'Legal Rights' which serves to join those sections substantively. On the other hand, he argues that broad liberties are articulated under s. 2 and titled 'fundamental freedoms.' The language of that text suggests that the list is intended to be exhaustive.

> With great respect for the contrary opinion, I am unable to believe that the framers would have limited the types of fundamental freedoms to which they intended to extend constitutional protection in such explicit terms, in s. 2 , and then, in s. 7, conferred 'general' protection by using a generic expression which would, unless its meaning were limited, included in the freedoms already protected by ss. 2 and 6, as well as all freedoms that were not listed. This approach is clearly contrary to the principles of legislative drafting that require that a general provision be placed before the provisions for its specific application. Moreover, if s. 7 were to include any type of freedom whatever,

> provided that it could be described as fundamental, we might seriously question the need for and purpose of s. 2. Either it is redundant, or s. 7 should then be considered to be a residual provision that we can make up for anything that Parliament may have left out (p. 343).

Chief Justice Lamer's point is a legitimate one and indeed, I am puzzled by the failure of the remainder of the Court to directly respond to his concerns about the charges of a redundant or a catch-all section if we are to broadly interpret liberty in s. 7. The question is whether it is possible to construe the liberty in s. 7 broadly in a way which makes sense of shearing off the fundamental freedoms in s. 2. Chief Justice Lamer could not envision such a reason, and so settled on the notion of physical liberty as the appropriate interpretation of s. 7.

It is worthwhile to identify the concern of jurists such as Lamer and others who fear that a broad interpretation of liberty in s. 7 will trivialize rights as it would allow all comers to try to slip their demands in through this barn-door sized section. We must keep in mind both that section 7 has its own built-in limitation, and also that, because ss. 1 and 7 are connected, whatever right is acknowledged by s. 7 is still subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society according to s. 1. This is the built-in stop gap. One must also recognize that to limit the definition of liberty in s. 7 could set a dangerous precedent.

What, then, is the need for s. 2 if those same interests are captured in s. 7? Apart from the procedural argument, it could be that the framers of the Constitution identified those freedoms in s. 2 as the most important individual interests. Even some notion of physical liberty is caught by the freedom of peaceful assembly and freedom of association. But while these might be our most important freedoms, and while many subsidiary freedoms will find their justification in s. 2, that does not mean that every individual freedom of sufficient import to require constitutional protection would be captured by s. 2. Those rights captured by s. 7 but not by s. 2 would simply require a more thorough-going analysis under s. 1. Section 2 may be viewed as a short-cut, so to speak.

Such an interpretation is not inconsistent with the view of the *Charter* as a living tree, and of the *Charter* as a document which purports to recognize and shelter individual freedom as a pre-eminent value in a liberal democracy. It is true that the fundamental freedoms articulated in s. 2 provide a roster of liberties which must be protected. Were these meant to be exhaustive, and more importantly, should they be exhaustive? The s. 7 'wait and see' approach to constitutionally protected liberty which is not specified in s. 2 of the *Charter* is not intolerable. The fact that American courts, which have a constitutional history of over 200 years, have needed to slip the somewhat analogous Fourteenth Amendment out of their back pocket in certain cases where substantive liberty required protection suggests that we cannot foresee all of those cases where individual liberty might be jeopardized to a degree that would cause society to collectively cry out for justice. These injustices may not fall so neatly within s. 2. To squelch that possibility while the Charter is yet in its infancy would be a grave mistake. The consequences of such a near-sighted interpretation, I suggest, would be much more dangerous than interpreting liberty expansively, and risk turning on the neon 'Open for Business' sign for liberty rights claimants.

For my purposes, however, I need not resolve this dispute once and for all. It is enough that the majority of the members of the Supreme Court of Canada are taking Justice Wilson's lead in attributing a generous interpretation to liberty in s. 7. At this moment in history, this stance is not inappropriate. Ultimately the parameters of liberty will emerge from the conflict of ascribing substantial weight to individual liberty and the danger of opening the flood-gates to frivolous claims. While the latter remains a possibility, Chief Justice Lamer's restrictive pronouncement of physical liberty is politically premature. Practically speaking, *Jones v. The Queen* and *B.(R) v. Children's Aid* provide a robust view of liberty which not only supports, but invites the proposed welfare right to an education under this section.

The paradox is that children's moral and legal right to an education is not a *liberty* right in the Hohfeldian sense, but a *claim* right derivative of a right to liberty. This claim right imposes positive duties of compliance, not immunities or disabilities on the part of others. In other words, the right to an education is oddly based on *a welfare right to liberty which demands paternalist intervention,* although as the child becomes an adult, this is what will make sense of, and enable the choice or option right to, liberty. Education is a prerequisite to meaningful liberty, whose constitutional purpose it is to serve the autonomic character of persons. As such, if the liberty in s. 7 is to have any meaning for children (and consequently, to future adults), the courts must protect positive liberty – equipping children with the tools to later exercise negative liberty – and this will entail guarding the right not only to an education, but to a particular conception of education: an education for open-mindedness.

The Right to an Education for Open-Mindedness: The American Experience

I have made an argument for the child's legal right to an education. But this begs the question, what *kind* of an education must the state provide to children? I have stated before that I am not ambitious enough to provide a taxonomy of educational objectives, but what I can say is that the education which the state is obligated to provide to children must entail at least the education of open-mindedness. This is not a giant leap from the preceding section. Indeed, hardy seeds were sown throughout the cases discussed which could only mature into an education for open-mindedness. In discussing liberty, the cases previously discussed used words like "human self-respect" and "the ability to pursue one's own conception of a full and rewarding life," "the ability to be able to decide what to do and how to do it," "a degree of autonomy in making decisions of fundamental importance," the right "to acquire useful knowledge," the freedom to develop and realize one's potential to the full, to make one's own decisions for good or ill, to "be his own person." These are not idle words – they do not merely support the legal welfare right to an education, but mandate a particular kind of education. If the importance of liberty in section 7 has been interpreted to hinge upon the development of autonomy (as the excerpts suggest), and if autonomy as a citizen and an individual rely upon the possession of the virtue of open-mindedness (as I have argued in chapter 4), then, assuming the courts are prepared to recognize the legal viability of positive welfare rights for children, the state will have a constitutional obligation to deliver an education for open-mindedness. Indeed, I suggest that this is the *only* way the story could unfold which would make liberty rights meaningful for children and which would show equal respect for their interests.

Importantly, section 7 liberty rights do not stand alone in defending this right. While s. 7 was useful in articulating a positive right to an education (because it is worded "everyone has the right to…"), section 2 is useful in fleshing out a right to an education for open-mindedness. Recall the relevant fundamental freedoms of s. 2: freedom of conscience and religion, freedom of thought, belief and expression. Indeed, the right to an education for open-mindedness could be argued under either s. 2 or s. 7 as the right overflows the dike between the two sections. What is more, the argument could be entirely successful under either section. In concert, however, the argument becomes even more forceful. While it was easier to make a case for a positive right to education under s. 7, it is perhaps easier to give that right substance by reference to s. 2. In the context of my argument, the two sections are symbiotic: the right to an education of s. 7 lacks force if the intellectual liberties of s. 2 do not inform its content; likewise, the intellectual freedoms are meaningless unless they are buttressed and nurtured by the right to an education.

The intellectual liberties of s. 2 are virtually unexplored in the Canadian educational context. To test the fit, I shall examine the American scene, whose more ample legal history on this issue may be of some assistance. Given what I have already said about the distinguishing features of the American and Canadian Constitutions, the example may not necessarily be one to emulate, but one from which we may choose to diverge as well. In other words, we can learn as much from American constitutional deficiencies as from its successes.

Section 2 of the *Charter* finds its American counterpart in the First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

In his book *Children, Education and the First Amendment* (1989), Moshman asserts that "underlying the First Amendment is a commitment to intellectual freedom as essential to the pursuit of truth, a critical prerequisite for democratic self-government, and a fundamental moral right of every individual" (p. 61). The terse wording of the American freedom of religion and speech was amplified to include freedom of conscience, thought, belief and expression under the *Charter*. This is consistent with American jurisprudential pronouncements.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the United States Supreme Court stated:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought and freedom to teach…Without those peripheral rights the specific rights would be less secure (p. 482).

For society at large, the First Amendment has been the bulwark which has faithfully protected intellectual liberty by safeguarding the right to speak and the right to hear.[6] In *Abrams v. United States* 250 U.S. 616 (1919) (Holmes, J., dissenting), Oliver Wendell Holmes of the United States Supreme Court discussed the idea of the free exchange of ideas in the context of the First Amendment right to freedom of speech.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted into the competition of the market…I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country (p. 650).

Holmes' broad support for freedom regarding the exchange of ideas is understood as the metaphor of the marketplace of ideas. Cass Sunstein (1993) fears that conceptually, the marketplace may be too broad a theoretical construct and that an unregulated intellectual free-for-all may actually be anathema to the germination of new and vigorous ideas. It may catch indiscriminately all forms of speech and ideas and place them all on an equal footing. Thus a multi-national corporation's right to advertise a health product of questionable value will stand on ground as solid as an ecologically-minded political candidate's to expose corporate abuses of ecological trusts; a tabloid's right to print stories of questionable repute as solid as a health care lobbyist's right to bring the idea of free health care for all citizens to the political forefront. Ironically, completely unregulated speech may effectively strangle free political speech. This was recognized by the United States Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 365 (1969). In that case, the plaintiff objected to FCC standards which imposed the requirement on radio and television broadcasters that discussion of public issues be presented on stations, and that each side of those issues be given fair coverage. This became known as 'the fairness doctrine.' The broadcasters challenged the doctrine on conventional First Amendment grounds, “alleging that the rules abridge their freedom of speech and press.” The Court summarized their argument thus:

> Their contention is that the First Amendment protects their desire to use their frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or refusing in his speech or other utterances to give equal weight to views of his opponents. This right, they say, applies equally to broadcasters (p. 371).

The Court observed that at one time, when the allocation of frequencies was left to the private sector, the result was ‘chaos.’ It became clear that “without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard” (p. 367). In rejecting the plaintiff's argument, the Court stated:

> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in s. 326, which forbids FCC interference with ‘the right of free speech by radio communication.’ Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licenses in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount (p. 372).

This view is consistent with Justice Brandeis' view of free speech in *Whitney v. California*, 274 U.S. 357 (1927). While he defends free speech as rigorously as Holmes in *Abrams v. United States*, the metaphor he uses is not one of a free marketplace of ideas, but of a society that values the free exchange of ideas because of their political significance.

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the

> incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be no time to expose through discussion, the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression (p. 372).

Regrettably, the shift in political climate to the right has resulted in the resurgence of unregulated speech, both commercial and political, on both television and radio airwaves. The sad result is often skewed advertising and biased coverage of political issues with relatively little deep public debate. In any event, while the appropriate construct for society at large may be debatable (whether an unregulated marketplace of ideas, or speech regulated in order to ensure some diversity of viewpoint), it seems clear that educational institutions will not offer for students' consumption an indiscriminate array of ideas or materials. Because schools have the mandate to educate, it seems unlikely that students' access to ideas will be left to chance. I share Strike's concern about permitting a marketplace of ideas within schools. If ideas are the means of thought and not just the objects, then students must be equipped with the fundamental ideas of various disciplines if they are to rigorously critique that framework, or to extrapolate beyond it. This means that some form of curricular regulation mat not only be defensible, but required in order to give meaning to freedom of speech and thought. Justice Brandeis emphasizes political virtue, public-spiritedness, and public deliberation. He extols the relationship between character and citizenship. While Holmes advocates a negative view of intellectual freedom, it is Brandeis' view which will correspond to 'positive' freedom of expression, thought and opinion. In this latter context, speech is considered to be purposeful and it is these purposes which ought to be protected.

Schools are regulated environments, and indeed, cannot accomplish their mandate of educating students unless they are regulated. At the same time, the United States Supreme Court proclaimed in *Tinker* that students do not leave their constitutional rights at the schoolhouse gates. A reconciliation of these two factors leads to the conclusion that the marketplace of ideas metaphor must be rejected if students' intellectual liberty is truly to be protected. The need to balance students' constitutional rights with the need for regulation is patent in educational jurisprudence. The question, of course, is whether the proper balance has been found.

We will recall that an education for open-mindedness will entail two stages. The first will correspond to the inculcation of beliefs and dispositions necessary to lay the building blocks for the development of the virtue of open-mindedness. Moshman (1989) proposes six principles concerning children's rights which he argues the state must respect as they flow inevitably from the First Amendment. The fifth of these reads:

> *Limited Inculcation*. (a) *Legitimate Purpose*. Government may inculcate ideas and values, but only when it has a legitimate purpose for doing so (e.g., to produce educated citizens). (b) *Religious Neutrality*. Government inculcation may not have as its purpose or principal effect, the advancement or hindrance of any religion or of religion in general. (c) *Nonindoctrination*. Government may not indoctrinate – that is, it may not inculcate ideas or values in a way that unnecessarily limits the possibility of critical of rational analysis (p. xv-xvi – Table 1).

This principle would seem to have found acceptance in American courts. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a public school required all students to salute the flag and pledge allegiance. The court acknowledged government's legitimate purposes in presenting ideas to students and attempting to persuade them by example to share American values. But that legitimacy did not extend to the point of requiring belief. The court condoned inculcation to a point, but held that the state must stop short of coercive indoctrination. The court noted that government legitimacy would be suspect where the consent of the governed was coerced by those in power. The government right to inculcate, then, is contained by margins on either side. On the one hand, inculcation which can be justified is legitimate; on the other hand, the courts forbid school officials to "prescribe what is orthodox" (p. 642). The proposition that the inculcation of belief as an objective of educators is not only a legitimate, but a sanctioned, activity is discussed in *Ambach v. Norwick*, 441 U.S. 68 (1979). In that case, the Court acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system" (pp. 76-7).

That view was reiterated in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). A high school student campaigning on behalf of a candidate gave a speech which school officials found obscene and for which the student was suspended. The Supreme Court ruled in favour of the school. The majority declined to overturn *Tinker*, but limited its scope. Chief Justice Burger argued that schools must have the authority to inculcate "the habits and manners of civility" (p. 680), that while students have the freedom to advocate controversial views, this must be "balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior" (p. 681). I shall set aside for the moment the issue of whether the judgment was appropriate, given that the students involved were high school students. The point here is that government inculcation is appropriate, but it may not "cast a pall of orthodoxy over the classroom" (*Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. at 603).

It is worth noting that the justification for inculcation of beliefs and values is made on the basis of legitimate *civic* ends. The autonomy of the child has played a less visible role in these cases. It is enough that the civic prong is addressed, and that we can make the empirical claim that, in terms of the development of autonomous capacity, a robust civic education which seeks to comply with the burdens of judgment will be virtually indistinguishable from an education whose objective it is to enable students to pursue personally autonomous lives. The caveat, of course, is that the power to inculcate of which the court speaks and which vests in school authorities, is circumscribed by the justifiable ends of citizenship education. It is not an unfettered discretion, but is directed by the objectives which permit it in the first instance. The continued movement toward self-regarding rights for children would suggest that this is an element that could not be ignored should similar cases come before the Supreme Court of Canada.

I have argued that the second stage for an education for open-mindedness will involve not the positive inculcation of moral dispositions, but the deliberate exposure to diverse, and sometimes divergent, opinions and ways of life. Indeed, the stage is marked by the intentional immersion of students into conflictual ideas. These ideas must conflict by necessity: it is the only way that students can learn to make sound decisions which does not infringe upon their status as self-directing persons who navigate their own lives and who participate in the democratic processes of a liberal society.

Moshman's first and third principles relating to children's First Amendment rights are as follow:

> *Free Expression.* (a) Government may not hinder children from forming or expressing any idea unless the abridgment of belief or expression serves a compelling purpose (e.g., to prevent disruption of education) that cannot be served in a less restrictive way. (b) Freedom of *Nonexpression.* Government may not require children to adopt or express a belief in any idea.
>
> *Freedom of Access.* Government may not restrict a child's access to ideas and sources of information unless the restriction serves a compelling purpose (e.g., to prevent demonstrable harm to the child) that cannot be served in a less restrictive way (p. xv – Table 1).

Read in the context of his sixth principle, a compelling case can be made for broad exposure to ideas, particularly in the high school years.

> *Nonarbitrary Distinction of Child from Adult.* Protection of children from harm due to their limited rationality may be a compelling reason for limiting First Amendment rights provided it can be shown that (a) the children in question are less rational than a minimally normal adult; (b) the difference in rationality is of a nature and extent such that substantial harm is likely unless First Amendment freedoms are abridged; and (c) the potential harm outweighs countervailing parental and First Amendment interests (p. xvi – Table 1).

The discussion in chapter five with respect to developmental theory led us to the conclusion that adolescents are as sophisticated at rational thinking as most adults, and that they are no more vulnerable to social influence than are many adults. The argument that adolescents must be shielded from contaminating influences at this age, then, is a spurious one. At least, there is no greater justification to shelter them than there is to shield adults.

The road to the recognition of children's intellectual liberty in the context of schooling has been both bumpy and meandering. At one time, the courts will make intrepid exclamations about children's freedom of speech (as in *Tinker)* and then claw back the benefaction in moments of conservatism (as in *Bethel v. Fraser*). While that latter case served our purposes in establishing the legal recognition of the state's right to inculcate values, the court sadly failed to distinguish between rights as they must be interpreted for different age groups. Nevertheless, progress has continued to be made toward the destination I have defended.

The first step in accepting students' rights vis-à-vis access to information was to accept that students have rights of voluntary access to materials in school library collections. In *Right to Read Defense Committee v. School Committee, etc.* 454 F. Supp. 703 (1978), District Judge Tauro addressed the issue whether the Chelsea School Committee was within its rights to bar a particular anthology of teen-age writings from the High School Library on the grounds that one of the poems was obscene. The School Committee defended the suit by claiming an unconstrained authority to remove books from the shelves of the school library. Various state statutes conferred general charge of the public schools and directing it to purchase textbooks and other supplies for the schools. The Right to Read Defense Committee argued that the action was in violation of the students' right to freedom of speech.

In that case, the court found that there had been no contention that the book had been improperly selected. It observed that, although the Committee had been under no obligation to purchase *Male & Female* for the library, the fact that it had been purchased could subsequently create a constitutionally protected interest. The court framed the question in this way:

> It is the tension between these necessary administrative powers and the First Amendment rights of those within the school system that underlies the conflict in this case. Clearly, a school committee can determine what books will go into a library and, indeed, if there will be a library at all. But the question presented here is whether a school committee has the same degree of discretion to order a book removed from a library (p. 708).

In rejecting the committee's claim to censor indiscriminately, the court censured any discretion to 'sanitize' the library of views divergent from its own. It stated:

> The fundamental notion underlying the First Amendment is that citizens, free to speak and hear, will be able to form judgments concerning matters affecting their lives, independent of any governmental suasion or propaganda. Consistent with that noble purpose, a school should be a readily accessible warehouse of ideas(p. 706).

Interestingly, the court appeared to adopt the notion of positive freedom, but, as a justification, was only prepared to extend that right in the realm of duties as a negative freedom – to justify retention and to impede the committee from *removing* a book from a school library.

The United States Supreme Court dealt with a factually similar case in *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982). In that case, the Board had removed nine books from a high school and junior high school library. It characterized the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." Several students had brought an action to have the books restored, relying on their First Amendment rights. Moshman synthesizes the case.

> The nine justices issued seven distinct opinions, none of which commanded a majority. Four viewed the school's authority to inculcate as central and, considering this to include broad authority to select and remove books, voted to overturn the appeals court decision and thus uphold the summary judgment for the school. Four other justices argued that, although school boards may indeed select and remove books in keeping with the authority to inculcate, some inculcation oversteps First Amendment limits on indoctrination. Thus, they voted to uphold the decision to remand for a full trial that would determine whether the school had, in this case, overstepped its authority. The deciding vote to remand for trial was cast on procedural grounds. Although there was unanimous agreement that public schools may inculcate, there was mass confusion as to what limits, if any, the Constitution sets on such inculcation and how such limits are best specified and justified (1989, p. 15).

The most that can be said of *Pico* is firstly, that the Supreme Court supported the view that public schools may inculcate ideas and values, and secondly, that the removal of a book from a school library may violate the First Amendment rights of students. Even the broadest interpretation of children's intellectual freedom (in the plurality decision of Justice Brennan) circumscribed the associated right to cases where books from school libraries and not classroom curricula, were involved, and where issues of removal, and not selection were raised. Justice Brennan narrowly construed the question before the court.

> [A]s this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read. Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of book originally placed there by the school authorities or without objection from them (p. 4834).

As in the *Right to Read* case, the Court acknowledged that local school boards have broad discretion in the management of school affairs. It also acknowledged (citing *Ambach v. Norwick*) that public schools are vitally important to the process of preparing citizens for participation in a democratic political system. Nevertheless, the courts may intervene where basic constitutional values are directly and sharply implicated, as they were in this case.

The Court felt it necessary to distinguish the removal of a library book from the selection of curricular materials, as it had in *Right to Read*. Presumably, the Court would more readily defer to the school board's discretion in such matters falling clearly within the parameters of public education. Yet I find the distinction to be ill-founded. It is difficult to see why the court must respect an arbitrary distinction between censorship and selection. If the Court acknowledges a right to access to ideas as being not only consistent with, but dictated by the First Amendment right, it is unclear why the Court would capitulate to school board discretion merely because a matter is curricular. Surely the right to access to ideas is more capacious than is suggested by permitting a student, of his own accord, to seek out certain controversial ideas. In fact, the board's selection of materials for students ought *even more legitimately* to be the subject of review, because these are *mandatory*.

It seems unquestionable that the courts recognize that inculcation of beliefs loses its authority at some stage. This is apparent by the fact that the courts are willing to entertain the importance of accessing ideas, even controversial ones, in the development of the citizen. But by failing to distinguish different developmental stages conceptually, the court is in a quandary as to how to reconcile apparently dichotomous objectives. In doing so, it creates the false division between curriculum and library materials and the inappropriate distinction between selection and removal of mandatory or optional materials. If the touchstone for education is personal autonomy and civic virtue, none of these areas can be ruled out of court, as they are all implicated. Whether materials are selected or rejected, mandatory or optional, ought to derive from these criteria.

The court in *Pratt v. Independent School District No. 831* 670 F. 2d 771 (1982) took the bold step of applying this reasoning to curricular materials which had been removed. Students within junior and senior high schools brought an action to compel the school district to reinstate the film version of the short story *The Lottery*. The film had been withdrawn from curriculum because the board considered the film's ideological and religious themes to be offensive. The court held that the students' right to freedom of speech had been infringed and ordered the re-instatement of the film to the curriculum. The court recognized a recent flurry of cases in which federal courts had considered First Amendment challenges to the removal of books from school libraries. He observed that those courts had generally concluded that a recognizable First Amendment claim exists if the book was excluded to suppress an ideological or religious viewpoint with which the authorities disagreed. "We believe," the court stated, "that this focus provides the proper framework for analysis here" (p. 776). The court thus extended the test for withdrawal of library books to withdrawal of curriculum materials. The court held that "to avoid a finding that it acted unconstitutionally, the board must establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information" (p. 777). In this case the board was unable to do so. In finding on behalf of the students, the court stated:

> 'The Lottery' is not a comforting film. But there is more at issue here than the sensibilities of those viewing the films. What is at stake is the right to receive information and to be exposed to controversial ideas – a fundamental First Amendment Right. If these films can be banned by those opposed to their ideological themes, then a precedent is set for the removal of any such work.
>
> In sum, while we are mindful that our role in reviewing the decisions of local school authorities is limited, we also have an obligation to uphold the Constitution to protect the fundamental rights of all citizens (p. 779).

Pratt, then is an extension of *Right to Read* and *Pico*. In those cases, the Court dealt with the withdrawal and re-instatement of *library* materials in a school setting. In *Pratt*, the Court dealt with the withdrawal and re-instatement of *curricular* materials. The argument is taken one step further in *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss.) 1980. In that case, the authors and editors of a social studies textbook brought a suit against the rating committee and State Purchasing Board for refusing to recommend their textbook for adoption as a school text. The court found that the textbook was rejected for no justifiable reason (as delineated in the selection guidelines). The court found that the evaluators disagreed with the racial slant of the text which painted Whites in an unfavourable historical light. Although the legislation provided for no recourse from the decision of the committee, (and the court found that it was the intent of the legislation to create a statutory procedure which would vest in the hands of the Governor and Superintendent of Education of the State the power to control the destiny of any textbook offered for adoption) the court took it upon itself to intervene.

> The context in which this statutory procedure was created, as evidenced by the newspaper clippings introduced at trial, clearly reveals an intent on the part of

> the legislature to eliminate allegedly controversial material from the schools' curriculum, and to insure that only the views of those in authority would be communicated to school children (p. 1149).

The court held that the statute was unconstitutional for failing to provide an appropriate avenue for review. It quoted, with approval, the U.S. Supreme Court decision of *Epperson v. Arkansas*, 393 U.S. 97.

> Our courts...have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of schools systems and which do not sharply implicate constitutional values. On the other hand...the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom' (p. 104-5).

The court in *Loewen v. Turnipseed* went on to state:

> All interested parties, whether they be textbook editors, teachers, parents or students have a fundamental interest in maintaining a free and open educational system that provides for the acquisition of useful knowledge...To the extent that the decisions of the textbook committee impinge upon a teacher's free choice of curriculum, or upon an editor's right to distribute his book, or upon a student's right to obtain an education, there must be some method by which uninhibited governmental control over the 'free exchange' of ideas can be checked (pp. 1153-54).

The defendants were enjoined to approve the impugned textbook, but the court declined to dictate a plan for textbook approval, leaving to the legislature instead an opportunity to correct the statute. It is to be noted that this decision was decided on the basis of the authors' and editors' free speech rights, and not on the students' rights to access to information, although the court left that open. As a result, no detailed analysis was made regarding when students ought to have access to ideas and when not, but the judgment certainly opens the door to precisely that kind of argument and affirms general principles regarding rights in relation to curriculum.

The case, however, takes the argument one step beyond *Pratt*. It is an example of the Court's readiness to become involved in curricular matters. But while the Court was prepared to mandate the *approval* of a textbook for curricular purposes, it merely made the textbook *accessible* to teachers or schools, should they choose to use that particular textbook in the classroom. The next step in the progression is predictable. The courts to this point have already based their arguments upon the same philosophical arguments as I have made in the preceding chapters. That is, they have recognized the importance of autonomy to personhood and the necessity of an education for participation as a citizen in a liberal democracy. Jurisprudence to this point has implicitly acknowledged the importance of open-mindedness to these two broad principles by relying upon access to ideas and information as crucial to personhood and to the progress of society.

The Right to an Education for Open-Mindedness: The Road Ahead

Now here is where my suggestions for an education for open-mindedness lay the next mile of the road. The ideas contained in American jurisprudence are evidence that much of my argument is not foreign to the Anglo-American legal tradition, and much has already been embraced, if not with a great deal of consistency. But the reasons which have brought the courts to this point *are no different from the reasons which impel it to take one more step.* And, in my view, taking one more step to mandate the inclusion of controversial ideas in school curricula *is more consistent with the intellectual liberty reasons which have driven the courts to this place.* In other words, my contention is that American law is in a state which aligns poorly with the respect for children's constitutional status which caused the court to rise from its comfortable, paternalist easy chair in the first place.

My allies abandon me at this discomfiting juncture. To his list of six principles to which Moshman suggests the courts must adhere out of respect for children's First Amendment rights, he adds seven principles articulated in the language "children have a right to…" He argues that governments, private schools and parents are *morally* obligated to act in accord with these broad intellectual rights (p. 53), but there is no obligation for them to do so. He distinguishes the legal negative rights of the former category and the moral positive rights of the latter (p. 54).

> Access to a variety of sources of information and to a diversity of opinions and perspectives plays an important role in formulating one's own ideas, which in turn is necessary in order to have anything to express. Moreover, freedom of expression obviously becomes meaningless if government can prevent access by others to one's ideas. Thus, although the First Amendment refers to expression rather than receipt of ideas, it directly entails a right to receive as well…
>
> It would go too far, however, to say that people have a positive First Amendment right to express or right to know. In forbidding abridgment of expression, the First Amendment does not generally require government to *facilitate* expression (e.g., by providing financial support for publication). Similarly, with respect to receipt of ideas, government is not affirmatively obligated to provide a child with every idea anyone has expressed. It simply may not take action to restrict his or her access (p. 40).

In the same vein, he later states:

> Nonselection is not necessarily censorship. Students may have a right of access and ideas and information (Principle 3), but government is not required to facilitate that access. Selecting a book for inclusion in the curriculum or library facilitates student access to the book; failure to select a particular book does not facilitate access to that book. Unless the government actively forbids students to read the book, however, nonselection does not restrict access and thus does not violate Principle 3. To suggest that government must actively

> facilitate access to every book that is published would be absurdly impractical (p. 125).

Likewise, while Wayne MacKay has defended the right to an education under s. 7, he is sceptical that the courts might become enticed to involve themselves in educational matters in the manner I have suggested.

> Another aspect of free expression is the control of school curricular and library material. On the part of the student this involves a right to know and read and a general claim of access to ideas. Taken at its broadest this could impose a positive duty upon the state to provide access to information. This would mean that a school board could be in violation of the constitution by not providing a certain book, as well as by removing one improperly. A curriculum could be declared inadequate simply because of its silence – a sin of omission rather than commission
>
> Canadian courts are not likely to accept such extravagant interpretations of free speech. Indeed, such claims have generally not succeeded in the United States. Courts have been concerned with more traditional matters such as the silencing of teachers on certain issues and the removal of books from the school (1986, pp. 34-5).

I remain undaunted in my task. I previously dealt with the issue of positive versus negative rights and made the case that, for the most part, negative rights do not serve the interests of children, including their constitutionally protected interests. Unless we are capable of making a paradigmatic shift to ascribe positive rights to children, these constitutional rights are virtually meaningless to them. The accumulation of the language and structure of the constitution itself and case law interpreting it, will likely make this transition more difficult in the United States than in Canada, where conditions are much more receptive to such an interpretation.

I confess to feeling somewhat puzzled by Moshman's abandonment, because he acknowledges the importance of coming face to face with diverse points of view.

> There is substantial evidence that exposure to diverse points of view and encouragement to form, express, and discuss one's opinions are crucial to

> intellectual development [citations omitted]. When government denies an adult access to diverse ideas, it is restricting available input, in denying such access to a child, however, it is also restricting development of the ability to coordinate differing views. Similarly, when government denies an adult free expression, it is denying the opportunity to communicate; in denying free expression to a child, however, it is also restricting development of the ability to form his or her own ideas. In short, denying First Amendment rights to a child restricts not merely the present exercise of those rights but also the further development of precisely those rational competencies that make the First Amendment meaningful. Contrary to the suggestion that children have limited First Amendment interest, then, it appears that, as future adults, they may have *more* to lose than present adults from government restriction of their intellectual freedoms (p. 51).

MacKay's hesitancy seems to be due to two factors. First, there is the pragmatic consideration that fiddling in the affairs of schools to the extent of mandating the inclusion of particular books could become a consuming business, and a very real fetter to the ability of the school to carry on their day to day business. But I am not suggesting interference on such a minute scale. Rather, my position is that the courts should simply elaborate guidelines to curriculum formation and materials selection which would prescribe the inclusion of controversial materials. This might, for example, be carried out by the identification of categories of controversial issues such as political theories, including communism, socialism, capitalism and so on. This does not seem to me to be inordinately meddlesome, nor extravagant.

MacKay's second concern would seem to be a comment on the conservative nature of the judiciary. The point is well taken. I think, though, that MacKay underestimates the Supreme Court of Canada's capacity for judicial activism. In the case of *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385, the Supreme Court of Canada held that the provincial government of Alberta infringed the rights of Vriend *by failing to provide in human rights legislation* a provision that Vriend not be discriminated against on the basis of his sexual orientation. This suggests that, in appropriate cases, courts are prepared to impose positive obligations of legislation. Human rights legislation falls within the authority of the province, as does the responsibility for education. As cited by Justices Cory and Iacobucci for the majority, section 32(1)(b) states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province." In referring to the decision of the Court of Appeal of Alberta, they wrote:

> The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny. McClung J.A. in the Alberta Court of Appeal criticized the application of the *Charter* to a legislative omission as an encroachment by the courts on legislative autonomy. He objected to what he saw as judges dictating provincial legislation under the pretext of constitutional scrutiny. In his view, a choice by the legislature not to legislate with respect to a particular matter within its jurisdiction, especially a controversial one, should not be open to review by the judiciary: "When they choose silence provincial legislatures need not march to the *Charter* drum. In a constitutional sense they need not march at all…The *Canadian Charter of Rights and Freedoms* was not adopted by the provinces to promote the federal extraction of subsidiary legislation from them but only to police it once it is proclaimed – if it is proclaimed" [citation omitted] (p. 412).

This view was rejected out of hand by the majority.

> It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified. It is not a question, as McClung J.A. suggested, of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act *or omission* is constitutional or not [italics added](p. 413).

The Court's concern was that underinclusive legislation worded so as to omit, either deliberately or inadvertently, would be immune from *Charter* review. The analogy to be drawn for our purposes is clear: the failure of a provincial legislature to give effect to the right to education generally, and the child's right to an education for open-mindedness in particular, will attract judicial scrutiny.

This still leaves the question of remedies. In *Vriend*, the state omission triggered the 'reading-in' remedy to maintain the integrity of the legislation and to raise it to constitutional standards. This may be more difficult in the case of curricular design, and the courts may be more reluctant to intrude in this area. In *Canadian Civil Liberties Association et al v. Ontario et al* (1990), 37 O.A.C. 93 (Ont. C.A.), the Ontario Court of Appeal examined both s. 28 of Ontario Regulation 262/80 which authorized religious instruction in Ontario public schools and the religious curricula of the Elgin County School Board established under the authority of that regulation. They found that both contravened s. 2(a) of the *Charter* in that the purpose and effect of both s. 28 and the curricula were to indoctrinate students into the Christian faith. While the court was prepared to strike down the unconstitutional regulation under s. 52(1) of the *Constitution Act, 1982*, it distinguished curriculum and characterized it as governmental conduct rather than as law. As such, the curriculum could not be struck down in the same way as the regulation, but was declared contrary to s. 2(a) of the *Charter* under the remedy provided by s. 24(1). An order was issued enjoining the Board from continuing to require or permit the curriculum to be offered in its schools.

The issue of the nature of curricula was not rigorously argued in the case of *Canadian Civil Liberties*, and it is possible that the Supreme Court of Canada might take a different view of the matter. In any case, the specific remedy will be enough to meet the requirements of ensuring that children are delivered an appropriate education if the courts take care to articulate their position. But whether an education for open-mindedness is "read into" school legislation, whether the existing curricula are declared unconstitutional law under s. 52(1) to the extent that they infringe a child's right to an education for open-mindedness, or whether curricula are construed as governmental action which violates children's rights, and from which school boards may be enjoined from utilizing in educating students, we might count the judicial intervention a victory.

Summary

I have attempted, in this chapter, to give a legal toehold to the child's moral right to an education for open-mindedness, a right which is based on the vital interest in having access to the personally autonomous life and one which facilitates active engagement in the public deliberation required of democratic citizens. Courts have traditionally recognized that most educational decisions are properly within the purview of educational experts, and as such, courts have remained complaisant in these matters. However, they have demonstrated a willingness to intervene in matters implicating constitutional rights.

Canadian courts have acknowledged that parents have both self-regarding and enabling rights vis-à-vis the education of their children. But what were once regarded as almost absolute rights in this area have been whittled away by the courts' recognition of the state's interest in the education of its citizenry and children's own self regarding rights. I contend that the moral right to an education for open-mindedness fits neatly within sections 2 and 7 of the *Charter*, both of which appeal to the concept of liberty. Section 7 forms the basis of a cogent argument for the right to an education; section 2 allows us to elaborate that to a right to an education for open-mindedness as it provides the umbrella for the intellectual liberties. The Supreme Court of Canada has ruled that these sections are capacious enough to embrace a view of liberty which is conjoined with autonomous personhood. While this is typically understood to constitute a negative conception of liberty, wherein the individual is free to act within broad, democratically justifiable limits, I have argued that this conception is inappropriate and impoverished in the context of the rights of children. Any view of liberty as instrumental to autonomous personhood must shift to a positive understanding of liberty in the case of children, lest they be disenfranchised as legitimate rights-holders. Negative liberty holds little meaning for them and invites gross negligence vis-à-vis their *interests*. This is unacceptable if it is the vital interests of agents which are the genesis of rights in the first place. The Supreme Court of Canada's pronouncements on liberty in s. 7 acknowledge its link to the autonomic interests of persons.

If courts are to recognize children's liberty which is derivative of the vital interest in access to autonomy, the enterprise of education must be implicated as it is a *sine qua non* to the development of those virtues upon which autonomous choice is predicated. As such, children's right to an education for open-mindedness is not a liberty right in the Hohfeldian sense, but a claim right derivative of a right to liberty. This means that children's right to an education for open-mindedness will place active demands on society to secure certain conditions conducive to the flourishing of open-mindedness in order to fulfill its obligations to them, and will not require mere forbearance.

This duty, I suggest, extends beyond access to materials in school libraries which students may access at their discretion. The development of the virtue of open-mindedness is not a haphazard undertaking. It will not demand mere forbearance on the part of those entrusted with the responsibility to educate children, but the *active* prescription of materials to students. In the developmental first stage, it will *require* teachers to present specific types of materials to their students which will encourage modeling and the development of specific dispositions which motivate the virtue of open-mindedness. In the second stage, it will *require* teachers to deal with controversial materials in the classroom, however uncomfortable that may be.

American legal precedent would suggest that this conclusion is not fanciful. In fact, the courts already acknowledge the basic tenets upon which the argument is based. Courts have already endorsed the inculcation of values fundamental to the maintenance of a democratic political system. Furthermore, they have alluded to the right to be exposed to ideas, particularly in the context of school libraries and even in limited cases where curriculum was involved. For example, a state was enjoined to adopt a particular textbook into the roster from which school boards might select, even though the book had previously met with the state's disapproval. Courts have stopped short, however, of mandating any particular types of materials. They have not gone beyond the reinstatement of curricular materials which were challenged by parents.

I believe that their reluctance to take that step to mandate, not specific literary works or ideas, but at least certain *types* of literature and ideas, does not emanate from their rejection of the right to an education for open-mindedness. Rather, it is a political faltering which arises out of uncertainty about how to properly address children's rights. Indeed, many of these cases are decided on the basis of a conflict between parents and school boards. Children are often shuffled into the corner because it is a thorny issue to mandate specific state compliance through positive action. Courts are more accustomed to saying what the state cannot do, rather than what it must do. *Vriend v. Alberta* has crosscut the trenches of judicial reactionaryism by holding a provincial legislature to the positive duty of enacting legislation in accordance with individual rights which are protected by the *Charter*. The importance of this decision cannot be overstated. It is an expression of the judicial will to take its role as the guardian of *Charter* rights very seriously. If a case can be made, as I think it can, that the right to an education for open-mindedness is a *sine qua non* to meaningful children's rights and freedoms under the *Charter*, the Supreme Court of Canada has signaled its willingness to meet the challenge by upsetting even long-held expectations.

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[1] It is worthwhile to point out that although the ensuing discussion will take place in the context of Canadian law, many countries have analogous provisions which are sufficiently plastic to accommodate a similar argument.

[2] In the interests of brevity, I shall not delve into this issue, but refer the reader instead to Mr. Justice Zuker (1988) *The legal context of education*. Toronto: O.I.S.E. Press, and Smith, W. (1993) Rights and freedoms in education: the application of the Charter to public school boards. in *Education Law Journal*, 4, 107-161

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[3] See Scott, S (1993) From major to minor: an historical overview of children's rights and benefits. in *Journal of Law and Social Policy*, 9, 222-57

[4] See *Serranto v. Priest*, 487 (2d) 1241 (1971)

[5] These include Justice Wilson's opinions in *R. v. Big M Drug Mart*, *R. v. Jones, Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, *R. v. Morgentaler*.

[6] Bowers, K. (1983) Banning books in public schools: *Board of Education v. Pico.* in *Pepperdine Law Review*, 20, 545-578 summarizes the U.S.S.C. decisions recognizing this right.

CONCLUSION

My argument has been a calculated one, each step building from the previous in what I think is a defensible progression. The conclusions at which I arrive are derivative of my basic premise: that equal respect for persons is a fundamental moral principle. I do not apologize for admitting that the cogency of my argument depends upon the acceptance of this principle. Not all will share this view, but I am on relatively solid footing making this assertion in the cultural climate of a liberal democratic country like Canada. To reject that claim privately would draw strange and even fearful glances; to reject it publicly would likely be tantamount to political suicide. That is not to say that Canada has tailored all of its laws to fit that principle, but as more and more government action is scrutinized by the polity and the judiciary, the principle of equal respect for persons will no doubt play a significant role in the resolution of issues.

One regret that I have in making this calculated case for the child's right to an education for open-mindedness is that didactic rhetoric is wrung free of the passion with which the argument ought to be made. It is difficult to discern in the backdrop of dry academic prose scenes that portray the 'what if's'. Indeed, what if we as a nation were to choose not to educate for open-mindedness? It has not been a looming issue in the past and no great apocalyptic fate befell us then. What is different now? The way things were done in the past reflected a particular culture, one which is rapidly disappearing in postmodern times. Homogeneous cultures have given way to multicultural societies pervaded by beliefs, values and different ways of doing things which challenge our own. The shrinking of the world at the same time as we are experiencing a technological explosion has created a world of vast possibilities – for one's life work, lifestyle, religion, leisure pursuits and countless other things. We are bombarded by choices. At the same time, the proliferation of private schools and charter schools, the majority of which have religious agendas is a cause for concern. In many of these religions it is a solemn duty to instill in children the unshakeable belief that one's way of doing things and in particular, one's religious beliefs are the only truth. To expose children to diversity of opinion as I suggest may seem to many to be courting some spiritual calamity, and so all effort is made to cloister children in one's faith. Two enormous issues confront us: how can we survive as a society in such fractious circumstances, and how can we possibly make sound choices in our own personal lives?

I have answered these questions to my own satisfaction. The virtue of open-mindedness, as a precursor to other liberal democratic virtues such as tolerance, and the ability to imagine sympathetically, for example, is the glue of social cohesion. Furthermore, it paves the way to the thoughtful democratic deliberation necessary to peaceful coexistence and progress. I do not know how one can be an ideal citizen in a society such as ours without being possessed of this virtue. Our private lives are similarly affected as we cannot be truly free or self-determined without having the capacity to assess alternatives and judge them fairly.

What is the alternative? One might consider the human history of atrocities: the burning of witches at the stake sanctioned by the Inquisition, the murder of millions of Jews at the hands of the Third Reich, the perpetration of 'ethnic cleansing' in the Balkans even as I write. We hear about the horrors committed by 'others': gas chambers, apartheid, slavery, starvation, children being forced to work in carpet factories and being sold for spare body parts, bombs planted in cars belonging to people with different religious views. And we think that it is all so far away, that we are immune. But if we think that, we are wrong, for human history bears out the fragility of peace and harmonious living , and social stability can collapse as quickly as factions come to believe that they need not treat others with equal respect.

Will all social ills be cured by the prescription I have written? Such a claim is extravagant, but it goes a surprisingly long way. Education of the young to the responsibilities of citizenship and to choose well in their personal lives is perhaps the best preventative medicine in our black bag. My legal prognostications of how the courts can and should view the child's right to an education for open-mindedness may never come to pass, but this may nevertheless have been a fruitful exercise. If I have succeeded in piquing the interest of teachers, administrators, parents, and politicians, then perhaps these will do what they can to implement an education respectful of children's rights absent dictum from the courts. I would count this a success.

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